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October Term, 1938.

THE COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,
Petitioners,

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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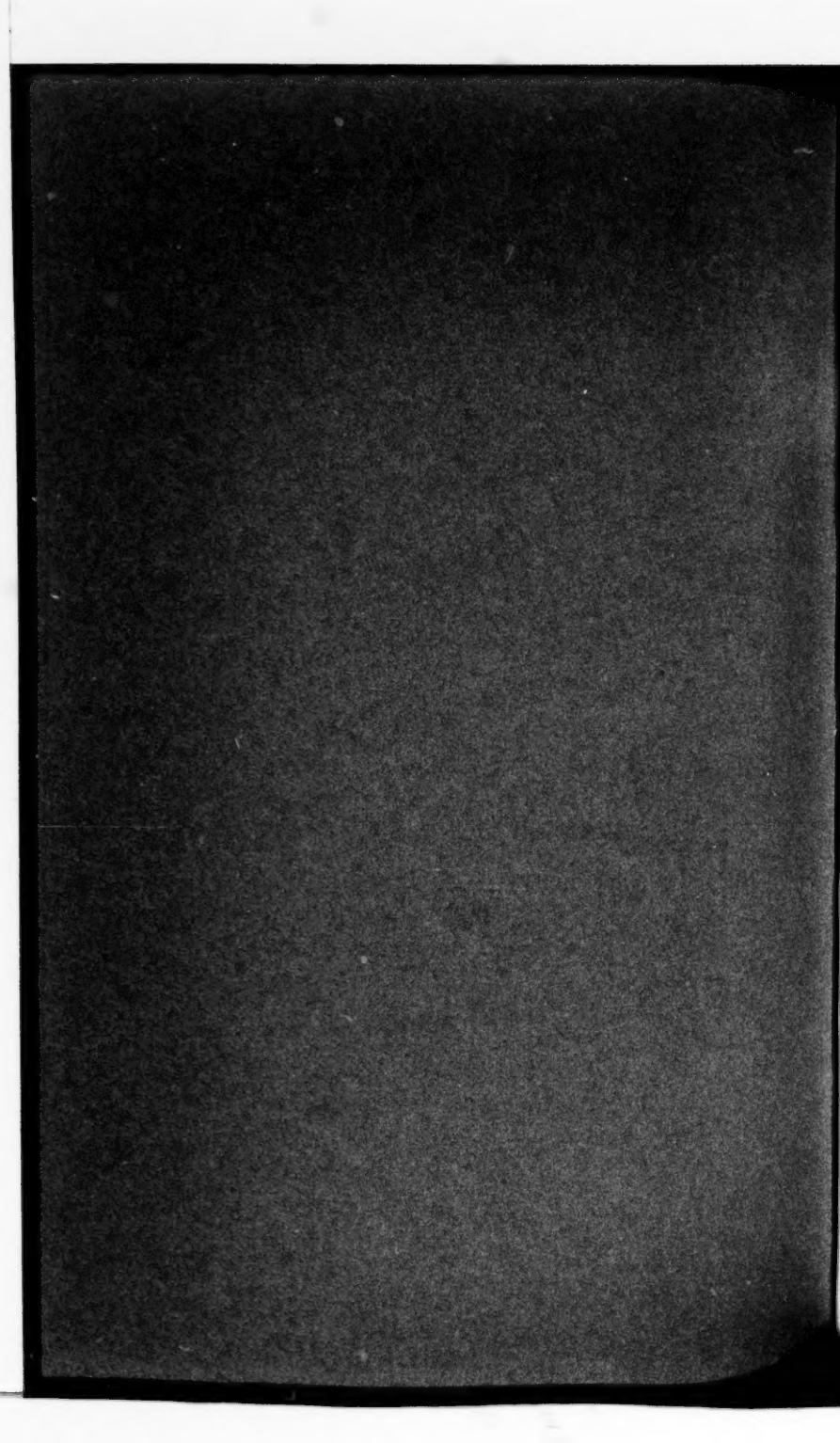

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Supreme Court of the United States.

OCTOBER TERM, 1949.

THE COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,
Petitioners,

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners, Thomas A. Flaherty, Edward N. Gadsby, John M. Whouley, David M. Brackman and James M. Carroll, constitute the Commission of the Department of Public Utilities for the Commonwealth of Massachusetts and pray that a writ of certiorari issue to review the decision of the Court of Appeals for the Second Circuit entered in the above cause on December 13, 1949, upholding, by majority decision, an order of the District Court of the United States for the District of Connecticut, and respectfully represent:

Opinions of the Courts Below.

The order of the District Court and memorandum of decision of Judge Hincks of that Court have not been reported. The order is dated April 25, 1949, and appears at pages 3 to 5 of the Record, and the memorandum of decision appears on pages 5 to 12 of the Record. The majority opinion and dissenting opinion in the Court of Appeals for the Second Circuit will be printed in 178 F. (2d) 559, and appears on pages 59 to 78 of the Record.

Jurisdiction.

The opinion of the Circuit Court was entered on December 13, 1949. The order of the District Court was entered on April 25, 1949.

The jurisdiction of this Court is invoked under 28 U.S.C. (new title), Section 1254(1).

Statute Involved.

The issue involves construction of Section 77(f) of the Bankruptcy Act, as amended, 11 U.S.C. Section 205(f) (Appendix, p. 38), especially the power of a District Court to construe certain provisions of a Consummated Reorganization Plan under a reservation of jurisdiction in absolute contradiction to the true intent of certain provisions of the Plan. The right granted to the Railroad under these decisions had been argued by the Commonwealth of Massachusetts before the Interstate Commerce Commission. The Commonwealth proposed that the Plan permit only such passenger service on the Old Colony Division until the losses were brought within reasonable limits. That proposal was considered, and expressly repudiated,

by the Interstate Commerce Commission prior to approval of the Reorganization Plan as finally consummated (261 I.C.C. 195, 202-204).

Interwoven herewith is the question of whether the paramount Federal power of the Interstate Commerce Commission to override state laws should be limited to the intent expressed by the Interstate Commerce Commission, and to have this Court determine whether action by a District Court by unauthorized exercise of judicial power in matters of intrastate regulation constitutes an unwarranted and illegal invasion of the rights and powers vested with the Commonwealth of Massachusetts in matters of intrastate regulation of railroads, and from the exercise of which the Commonwealth should not be held to have been deprived, by reasonable interpretation of the exercise of paramount Federal power arising under the said Section 77(f).

Questions Presented.

1. May a United States District Court of a neighboring District by judicial reasoning construe certain provisions of a Consummated Reorganization Plan in such manner as to alter in a material way and change those provisions from the expressed intent of the Interstate Commerce Commission while promulgating the Plan?

2. Whether the overriding of certain state laws by virtue of paramount Federal law deprives a sovereign commonwealth of all regulation of intrastate passenger service on the reorganized Railroad, or only to the extent specified in the Consummated Reorganization Plan.

3. May a District Court judge, acting under said Section 77(f), authorize a railroad to curtail passenger service on a division of said reorganized road until the losses

are brought within reasonable limits, when prior to the approval of the Reorganization Plan a similar proposal of the Commonwealth of Massachusetts had been rejected by the Interstate Commerce Commission?

4. Has a District Court judge power to enjoin a state regulatory commission from the exercise of regulation of passenger service within the Commonwealth when the District Court's opinion has only its own reasoning to support it? Nothing that this Court has ever decided or sanctioned gives it strength.

Davis v. *United States*, 328 U.S. 582, 603.

5. Where there is a conflict of regulatory power over intrastate passenger service, whether a United States District Court is authorized to construe a Consummated Reorganization Plan by a petition that only requests construction of a Consummated Reorganization Plan without averring subsequent changes in conditions or that requests re-examination of the Plan by the Interstate Commerce Commission in derogation of the sovereign powers of a state.

6. Whether the decision of the Court of Appeals for the Second Circuit is in conflict with decisions of this Court in so far as they have a bearing upon the question here presented.

Ecker v. *Western Pacific R.R. Corp.*, 318 U.S. 448.

Group of Institutional Investors v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 318 U.S. 523.

Insurance Group Committee v. *Denver & Rio Grande Western R.R. Co.*, 329 U.S. 607, 611.

Reconstruction Finance Corp. v. *Denver & Rio Grande Western R.R. Co.*, 328 U.S. 495, 522.

7. Whether the decision of the Court of Appeals is in conflict with decisions in other districts or circuits, and in its own circuit.

In re Broadway Hotel Co. (C.C.A. 7th, 1942), 131 F. (2d) 120.

In re Utilities Power & Light Corp. (C.C.A. 7th, 1942), 125 F. (2d) 343.

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Clinton Trust Co. v. *Elliott Leather Co.* (C.C.A. 2d), 132 F. (2d) 299, 303, 304.

8. Whether the power vested in the Interstate Commerce Commission to supersede state charters as part of a complete Reorganization Plan empowers a District Court to construe certain provisions of that Plan in contravention to changes proposed prior to the adoption of the Plan by the Commonwealth of Massachusetts and rejected by the Interstate Commerce Commission.

9. Whether a Federal Court is empowered to restrain duly authorized officials of a sovereign state from acting on powers ordinarily entrusted to them in the regulation of intrastate passenger service and from which powers

they ought not to be held to have been deprived from acting by virtue of paramount Federal law.

Reasons Relied on for the Granting of the Writ.

The petitioners contend that the writ of certiorari should be granted for the following reasons:

1. This case presents an important question of Federal law which has not been, but should be, determined by this Honorable Court.

The Court of Appeals for the Second Circuit, by majority decision, has decided that a District Court under a reservation of jurisdiction in a Consummated Reorganization Plan may grant relief to a reorganized railroad in contravention of the true intent of the Consummated Plan. By virtue thereof the railroad is invested with purely discretionary powers, free from all regulatory supervision, to run such passenger service on a division of the reorganized railroad as it deems necessary or proper. As Mr. Justice Clark states in his dissenting opinion (p. 72):

> "The Commonwealth of Massachusetts objected strenuously to these provisions, and one of the proposals for modifying the plan which it made was to 'permit no more discontinuance of passenger traffic on the Old Colony properties than is needed to reach the critical figures.' Fourth Supplemental Report, 254 I.C.C. 405, 421. This was an endeavor to have the plan authorize exactly what the New Haven now claims it has discretionary power to attempt, i.e., to curtail passenger service until the losses are brought within reasonable limits, rather than discontinue it. But the Commission refused to accept this proposal. It said significantly: 'It is likewise clear that to modify materially the provision of the Joint Report in respect of

the Old Colony would be to nullify the compromise agreement reached after extended negotiations with little or no expectation that the suggested modification would prove acceptable to the interested parties.' "

This Court has not construed Section 77(f), relative to the extent of the power vested in a District Court under a reservation of jurisdiction in a Consummated Reorganization Plan so as to deprive and enjoin a state regulatory commission from exercising the powers vested in said commission. The decision of the Court of Appeals upholds an unauthorized exercise of judicial powers in matters of intrastate regulation of a railroad, and constitutes an unwarranted and illegal invasion of the rights and powers vested in the Commonwealth of Massachusetts in matters of intrastate regulation of railroads.

Of paramount interest is a determination of what powers are still reserved to a state after reorganization has been completed, even though certain of its powers have been superseded by virtue of paramount Federal law.

> *Callaway* v. *Benton,* 336 U.S. 132, 140.
> *Seaboard Air Line R.R. Co.* v. *Daniel,* 333 U.S. 118.

The Department of Public Utilities of the Commonwealth of Massachusetts is an administrative commission created by an Act of the Legislature of the Commonwealth of Massachusetts for the regulation and supervision of public utilities, such as railroads, and in these proceedings is the proper party to maintain this suit, in that the New Haven Railroad in its petition requested the District Court of Connecticut to enjoin the Department of Public Utilities from interfering with the proposal of the reorganized company to discontinue all or any part of the passenger

service on the former Old Colony lines (R. 20). In its petition the only question raised by the Railroad was whether the Court had power to construe a Reorganization Plan so as to arrive at a determination in contravention of the express intent of the Interstate Commerce Commission. By its decision an enjoining order from a District Court of a neighboring state barred the regulatory authorities of a sovereign commonwealth from exercising the powers ordinarily invested in it. The decision of this Honorable Court holding that paramount Federal law may override state law as part of a complete Reorganization Plan (*Palmer* v. *Massachusetts*, 308 U.S. 79) could hardly have been intended to be construed to deprive a sovereign state of all regulation of intrastate passenger service after reorganization had been completed. This Court could only have intended to say that the Interstate Commerce Commission had power to override such state powers in strict accordance with the terms of the Reorganization Plan. Since this Court is the final arbiter of the conflicting demands of state and national interests (*Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 766, 769), the determination of this Court on this matter is of national importance.

This Court should forthwith receive and decide whether a purported reservation of jurisdiction in a Consummated Reorganization Plan empowers a District Court of the United States to enjoin a state regulatory commission by construing the Plan in derogation of claims heretofore urged upon the Interstate Commerce Commission by the Commonwealth of Massachusetts and rejected by the Interstate Commerce Commission prior to confirmation of the Plan. Under such a reservation is a District Court authorized to "rewrite a fundamental feature of the plan"?

Is not certiorari an appropriate procedure by which all these questions may be decided and final justice done?

Certiorari affords a proper means by which this Court may correct and interpret the extent of and limits of paramount Federal law in apposition to state laws, and the Court should in the circumstances hear and determine the case in view of the public interest, so that operation of Section 77(f) may not be construed to permit a reorganized railroad to operate free of all regulation by either state or Federal power, and that the Courts may not under a Consummated Reorganization Plan keep either a reorganized road or state authority under perpetual tutelage.

Statement of Facts.

This appeal is another phase of reorganization under the Bankruptcy Act (11 U.S.C. Sec. 205) of the New York, New Haven and Hartford Railroad Company. The Commission of the Department of Public Utilities of the Commonwealth of Massachusetts has requested a writ of certiorari to the United States Court of Appeals for the Second Circuit, which, by majority decision rendered December 13, 1949, affirmed an order of the United States District Court for Connecticut restraining the said Department from interfering with the curtailment of passenger service on the Old Colony Division of the reorganized New Haven as of March 1, 1949.

This petition requests review of a decision of the Court of Appeals for the Second Circuit upholding an order of the United States District Court of Connecticut, made under a purported reservation of jurisdiction in the Consummated Reorganization Plan of the New Haven Railroad, entered September 11, 1947, in reorganization proceedings of the New York, New Haven and Hartford Railroad Company. The reorganization proceedings were started October 23, 1935, in the Bankruptcy Court for the

District of Connecticut pursuant to Section 77 of the Bankruptcy Act, U.S.C., Section 205. Other aspects of this reorganization plan have been reviewed by the said Court of Appeals on eleven, and by this Honorable Court on six, different occasions.

During the extended reorganization proceedings the Interstate Commerce Commission issued six supplemental reports. Its Third, Fourth and Fifth Reports covered aspects of the inclusion in the Plan of the Old Colony lines, most of which were adopted or ratified in its Sixth Supplemental Report.

Early in February of 1949 the New Haven Railroad petitioned the said Department of Public Utilities for authority to curtail passenger service on the Old Colony Division. On February 28, 1949, the Department of Public Utilities, in accordance with the statute, Mass. G.L. (Ter. Ed.) c. 160, § 128, ordered the New Haven to continue unchanged the passenger schedule theretofore in effect on said Old Colony Division pending investigation and hearing. On the same day, upon urgent oral representations on behalf of the said Railroad, which were reduced to writing on the following day in a written petition for construction for the Plan of Reorganization and for a permanent injunction (R. 14-20), the said District Court of Connecticut temporarily restrained the Department of Public Utilities of the Commonwealth of Massachusetts, and all other persons, from interfering with curtailment of passenger service on said Division of said reorganized Railroad. It issued a temporary stay order *ex parte*, because it appeared that the Railroad had made all plans to put into effect on March 1st the proposed curtailment. The said District Court ordered a hearing on March 8th, to "determine if there were cause why the restraining order should not be made permanent" (Memorandum of Decision, R. 6). At said hearing Assistant Attorneys Gen-

eral entered special appearances for the State Public Utilities Department, and filed a plea to the jurisdiction.

By leave of Court said counsel filed an answer to the New Haven petition on March 25th. The New Haven filed a reply brief on April 8th. On April 14th the Court filed a memorandum of decision, findings and conclusions, which overruled the special appearances, the plea to the jurisdiction, and upheld the Railroad's prayers (R. 5-12). The said District Court entered a final order on April 25th making the injunction permanent.

The Department appealed under Section 24a of the Bankruptcy Act (11 U.S.C. Sec. 47(a)) from the order of the United States District Court of Connecticut entered on April 25, 1949, which permanently restrained the Department of Public Utilities and the Attorney General of the Commonwealth of Massachusetts and all other persons from interfering with curtailment of passenger service effective March 1, 1949, on the Old Colony Division of the reorganized Railroad Company.

The Court of Appeals for the Second District decided on December 13, 1949, by a divided Court, to uphold the order of the District Court of Connecticut (R. 59-77). On the same date that Court entered an order affirming the order of the District Court of the United States for the District of Connecticut.

Statement of Material Facts.

The petition of the reorganized Railroad (R. 20) prayed only that the District Court "construe the foregoing provisions of the Plan to permit the Company to discontinue all or any part of the passenger service on the former Old Colony lines and to experiment with it at will to the end that the losses from it may be limited or reduced." That

petition did not ask instructions as to questions which might arise under subdivision (n) of the reservation of jurisdiction quoted below.

In this petition for a writ of certiorari the Commonwealth of Massachusetts, acting through its Department of Public Utilities, does not challenge or question the power of paramount Federal law to override state laws in the interests of interstate commerce under Section 77. The Commonwealth asserts, however, that the exercise of paramount Federal law overriding state laws should be strictly limited to the express powers granted by the Interstate Commerce Commission in a Consummated Reorganization Plan, and that exercise of judicial discretion in this matter has exceeded the power exercised by the Interstate Commerce Commission in the Consummated Reorganization Plan of the New Haven Railroad to override the statutes and charters of the Commonwealth of Massachusetts.

The salient provisions pertinent to the issue here raised in the Reorganization Plan are as follows:

Section N(3)(a) (set forth in full in the Record on pages 14 and 15) states that passenger service on Old Colony's lines may be discontinued if during any of the periods described below passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect. The critical figure for any twelve consecutive calendar months, all of which are within the first two years following the consummation of the Plan, shall be $850,000. The critical figure for any twenty-four consecutive calendar months, all of which shall be after the end of the two-year period, shall be $500,000.

Paragraph (3)(b) (set forth in full on page 16 of the Record) provides a method of determining the amount of the passenger losses on the Old Colony Division, and provides a method for the Department of Public Utilities of

Massachusetts to question the computation of the reorganized company, if it deems the Commonwealth or the public aggrieved by a proposed discontinuance of passenger service.

The Consummated Reorganization Plan also contained sixteen express reservations of jurisdiction, of which only the following are material here:

l. To consider and act in any matter arising out of the option granted in the Plan to the Commonwealth of Massachusetts for the purchase of the so-called "Boston Group lines."

m. To consider and act on any question respecting the "critical figures" established by the Plan with respect to the determination by the reorganized company to curtail passenger service on the Old Colony lines.

q. To take such further action as may be necessary to put into effect and carry out this order and the Plan and all other orders relative thereto heretofore entered by the Court, provided, however, that nothing in this Section 2 shall be construed as a reservation of jurisdiction to change the Plan, or any of the rights vested thereunder or any of the rights of the holders of the new securities, or persons entitled to receive them.

3. Termination of Jurisdiction—except as provided in Section 2 of this subdivision XI hereinabove, all jurisdiction of this Court in or by virtue of these proceedings is hereby, as of the consummation date, wholly terminated; and except only as aforesaid and effective as of the consummation date, this proceeding is hereby closed.

The Interstate Commerce Commission in its First Supplemental Report, 244 I.C.C. 239, 264, 265, inserted in the Plan the "escape clause" intended to permit temporary continuance so long as the losses incurred were not too great. The escape clause met opposition and the controversial joint report, adopted by the Interstate Commerce Commission, allowed the New Haven to discontinue passenger service on the Old Colony if losses exceeded certain critical figures (Third Supplemental Report, 254 I.C.C. 63).

The Commonwealth of Massachusetts objected strenuously to those provisions, and one of the proposals for modifying the Plan which it made to the Interstate Commerce Commission was to "permit no more discontinuance of passenger traffic on the Old Colony properties than is needed to reach the critical figures" (Fourth Supplemental Report, 254 I.C.C. 405, 421). In other words, the Interstate Commerce Commission, prior to the adoption of the Plan, declined to permit exactly what the New Haven now claims it has discretionary power to attempt, *i.e.*, to curtail passenger service until the losses are brought within reasonable limits, rather than abandon such service.

Yet the District Court of Connecticut by judicial reasoning has upheld the Railroad and its order has been affirmed by the Court of Appeals.

Section N(2)(a) of the Plan provides: "The charter of the reorganized company and of Old Colony shall be amended, and the franchises and statutory obligations of the reorganized company and of Old Colony shall be amended or superseded so that neither road will be under any obligation to operate passenger service on Old Colony lines. The reorganized company shall, however, undertake . . . a contractual obligation to operate for its own account passenger service on Old Colony lines, if and so

long as, the losses therefrom do not exceed the critical figures provided below."

The question is whether the exercise of paramount Federal law, relieving the reorganized Railroad from obligations imposed by state charter which provided that the reorganized road might only conduct passenger service until a reasonable test had shown that the losses therefrom would constitute too great a burden on interstate commerce, permits the Railroad to operate such passenger service as it desires free from all regulatory procedure.

The Commonwealth maintains that the Interstate Commerce Commission, under the powers vested in it by said Section 77, authorized the Railroad to abandon passenger service when and if the losses exceeded the critical figures. Thereafter the Railroad could no longer operate passenger service on the Old Colony Division. Many statements have been made and probably will be made that, if the Department of the Attorney General advocates abandonment of passenger service on the Old Colony lines, the Railroad will be glad to comply. The short answer to that argument is that in strict compliance with the provisions of the Reorganization Plan the Railroad must abandon passenger service and, regardless how any official of the Commonwealth of Massachusetts, including the Attorney General, may think, the Commonwealth of Massachusetts is powerless to prevent such action being taken in strict accordance with the terms of the Plan, because paramount Federal law has superseded the rights and powers of the Commonwealth of Massachusetts in that particular aspect. In the interests of interstate commerce it would be futile for the officials of the Commonwealth of Massachusetts to argue that the Commonwealth has any choice in the matter. In these proceedings, however, the reorganized New Haven does not pursue its right to abandon passenger service; it merely asks the Court to construe a provision

in the Reorganization Plan in absolute derogation of the true intent of the Plan as finally adopted by the only power vested with authority to override state laws in reorganization proceedings. Under the order of the District Court of Connecticut, as affirmed by the Circuit Court of Appeals, the reorganized Railroad may "cease, taper off, continue or expand" passenger service on the Old Colony Division as it desires.

In this issue the Department of Public Utilities is the sole power authorized by statute to represent the interests of the Commonwealth of Massachusetts. By this petition it endeavors to protect the rights inherent to this Commonwealth, of those powers which have not been superseded by any reasonable interpretation of the power exercised by the Interstate Commerce Commission in the promulgation of the Reorganization Plan as finally consummated in the New Haven proceedings.

The Interstate Commerce Commission, being an agency of limited powers and authority, may not exceed its statutory powers.

> *United States* v. *Pennsylvania Railroad Co.*, 242 U.S. 208.

By Section 77(c)(6) the Interstate Commerce Commission is authorized to permit abandonment in accordance with Section 1 of Title 49. The Interstate Commerce Commission has always rejected the contention that it has power to authorize curtailment under Section 1 of Title 49. Hence, unless the Reorganization Plan expresses in clear language the thought that the Plan authorizes curtailment, judicial interpretation should not authorize curtailment as opposed to abandonment.

Argument.

This Court decided in the R.F.C. and Insurance Group cases, 328 U.S. and 329 U.S., that a Consummated Reorganization Plan cannot be re-examined by a Federal District Court or the Interstate Commerce Commission on matters considered by and previously rejected by the Interstate Commerce Commission. In its petition to the District Court of Connecticut the reorganized New Haven Railroad did not allege that any changed conditions required re-examination. The reorganized Railroad merely asked that Court to construe certain provisions of the Plan so as to permit it to operate such passenger service as it desired on the Old Colony Division (R. 20). In fact and in truth, it asked the Court to construe certain provisions of the Plan in accordance with the desires of the Railroad and in direct contravention to the Plan finally adopted by the Interstate Commerce Commission. The Interstate Commerce Commission had decisively rejected the proposal of the Commonwealth of Massachusetts to permit no more discontinuance of passenger traffic on the Old Colony than is needed to reach the critical figures (Fourth Supplemental Report, 254 I.C.C. 405, 421, 422). A decree of confirmation is final under Section 77 where there is no provision for subsequent modification. Under a reservation of jurisdiction a Court ought not to modify or change the Plan. The confirmation order confirmed by the Second Circuit in 147 F. (2d) 40, 51, was indirectly affirmed by this Court in denying certiorari in 325 U.S. 884, and a rehearing in 326 U.S. 805. The Consummated Reorganization Order was a complete and final disposition of the debtor's property, and under any reservation of jurisdiction the only power vested in the Court is to see that the Plan is carried out according to its true intent.

This Court has authority to bring a case before it for decision by a writ of certiorari "after rendition of judgment or decree" of the Court of Appeals (28 U.S.C. Sec. 1254(1)). Such procedure is provided for by Rule 38(b) of this Court, which states:

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Nothing in the Bankruptcy Act restricts this plenary authority (Section 24 of the Bankruptcy Act, 11 U.S.C. Sec. 47).

So certiorari is a means by which this Court may exercise its full authority. Specifically it is proper procedure for ending a departure in the Courts below from the effect of recent decisions of this Court.

The consequences to the public regard for law and order that may follow upon any other course are far more serious.

The decision below is a dangerous departure from doctrines clearly settled by this Court and the administrative powers of the Interstate Commerce Commission and regulatory commissions of the several states.

The questions are not alone of public concern by reason of the substantial risk the decision raises of an indefinite

prolongation of controversies affecting the Court's powers under Section 77, but are of vital concern to the inherent powers of a state, not expressly or clearly superseded by operation of paramount Federal law. It is even more important for its disturbing implications in the whole field of corporate reorganization involving problems arising under the Commerce Clause of the United States Constitution, and is thus of national importance.

Prayer and Motion.

We respectfully ask that this Court may forthwith:

a. Grant a writ of certiorari to review the decision of the Court of Appeals dated December 13, 1949, in such manner as to give this Court authority to dispose of the whole matter, or order the matter referred to the Interstate Commerce Commission in the exercise of judicial discretion of intervening rights.

b. Summarily vacate and supersede said decision.

c. Grant all such other relief as may be proper.

Respectfully submitted,

COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES,

By their Attorneys,

FRANCIS E. KELLY,
Attorney General,

FRANCIS J. ROCHE,
Assistant Attorney General,

DAVID H. STUART,
Assistant Attorney General.

Supreme Court of the United States.

OCTOBER TERM, 1949.

THE COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,
Petitioners,

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Statement.

This is a petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit, dated December 13, 1949, affirming an order of the United States District Court for the District of Connecticut, dated April 25, 1949, which permanently restrained the Department of Public Utilities for the Commonwealth of Massachusetts, the Attorney General and all other persons from interfering with partial discontinuance of passenger service as of March 1, 1949, on the Old Colony Division of the Reorganized New York, New Haven and Hartford Railroad Company.

Opinions of the Courts Below.

The order of the District Court and memorandum of decision of Judge Hincks of that Court have not been reported. The order is dated April 25, 1949, and appears at pages 3 to 5 of the Record, and the Memorandum of Decision appears on pages 5 to 12 of the Record. The majority opinion and dissenting opinion in the Court of Appeals for the Second Circuit will be printed in 178 F. (2d) 559, and appears on pages 59 to 78 of the Record.

Jurisdiction.

The opinion of the Circuit Court was entered on December 13, 1949. The order of the District Court was entered on April 25, 1949.

The jurisdiction of this Court is invoked under 28 U.S.C. (new title), Section 1254(1).

Statute Involved.

The issue involves construction of Section 77(f) of the Bankruptcy Act, as amended, 11 U.S.C. Section 205(f) (Appendix, p. 38), especially the power of a District Court to construe certain provisions of a Consummated Reorganization Plan under a reservation of jurisdiction in absolute contradiction to the true intent of certain provisions of the Plan. The right granted to the Railroad under these decisions had been argued by the Commonwealth of Massachusetts before the Interstate Commerce Commission. The Commonwealth proposed that the Plan permit only such passenger service on the Old Colony Division until the losses were brought within reasonable limits. That proposal was considered, and expressly repudiated, by the Interstate Commerce Commission prior to approval

of the Reorganization Plan as finally consummated (261 I.C.C. 195, 202-204).

Interwoven herewith is the question of whether the paramount Federal power of the Interstate Commerce Commission to override state laws should be limited to the intent expressed by the Interstate Commerce Commission. And to have this Court determine whether action by a District Court by unauthorized exercise of judicial power in matters of intrastate regulation constitutes an unwarranted and illegal invasion of the rights and powers vested with the Commonwealth of Massachusetts in matters of intrastate regulation of railroads. From the exercise of which the Commonwealth should not be held to have been deprived, by reasonable interpretation of the exercise of paramount Federal power arising under said Section 77(f) in the Consummated Reorganization Plan.

Questions Raised.

The various questions raised are set forth in full in the petition for this writ. They may be summarized as follows:

The point of decision on which review is sought.

The real question raised by this petition is whether the United States District Court for the District of Connecticut, sitting as a Court of Bankruptcy, after reorganization proceedings have been consummated under Section 77 of the Bankruptcy Act (11 U.S.C. 205), had authority under a reservation of jurisdiction to construe certain provisions of the Consummated Reorganization Plan to permit the reorganized Railroad to continue, partially, passenger service on its Old Colony Division in derogation of the expressed intent of the Interstate Commerce Commission,

to order abandonment of passenger service on the Old Colony Division of the reorganized Railroad on the happening of certain contingencies. A further question is raised whether the overriding of certain powers of the state by paramount Federal authority, under a grant of power of the Commission, thereafter operates to supersede all regulatory powers of the state or Commonwealth.

Argument.

I.

UNDER SECTION 77 THE BANKRUPTCY COURT IS NOT VESTED WITH POWER TO AUTHORIZE A RAILROAD TO CHANGE THE PLAN AFTER A CONSUMMATED REORGANIZATION PLAN BECAME EFFECTIVE.

Under settled principles, the Interstate Commerce Commission may amend the Railroad's charter in the interests of interstate commerce. In this reorganization it ordered the Railroad to abandon passenger service on its Old Colony lines on the happening of certain contingencies based on excessive operating losses.

II.

SECTION 77 AUTHORIZES THE AMENDMENT OF THE RAILROAD'S CHARTER AND THE SUPERSEDING OF STATE CHARTERS AND LAWS ONLY AS THEY ARE MADE AN INTEGRAL PART OF THE PLAN OF REORGANIZATION, FIRST APPROVED BY THE INTERSTATE COMMERCE COMMISSION.

The statute contains neither express nor general language endowing the bankruptcy Court with plenary authority at any time to order a Railroad, which has emerged from its jurisdiction as a reorganized entity, to hold that, since the Interstate Commerce Commission had

assumed the jurisdiction granted it to supersede state authority in certain particulars, to wit, the power to abandon passenger service on a division of the said Railroad, the Court is vested with authority to modify the express terms of the Plan by permitting the Railroad, some two years after it has been reorganized, to discontinue only certain passenger service.

A railroad cannot abandon the public service which was the condition upon which its franchises were granted and still retain them, save perhaps as proper authority has determined that the state interest is outweighed by the interests of the nation in adequate, economical and efficient railway transportation service.

Southern Pacific Co. v. *Arizona*, 325 U.S. 761, 769.

III.

THE CONSUMMATED REORGANIZATION PLAN OF THE NEW HAVEN RAILROAD AUTHORIZED THE REORGANIZED RAILROAD TO ABANDON PASSENGER SERVICE ON THE OLD COLONY DIVISION, BUT BY VIRTUE OF THE ORDER OF THE DISTRICT COURT IT IS NOW AUTHORIZED TO RUN ANY NUMBER OF PASSENGER TRAINS ON THE SAID DIVISION IN ACCORDANCE ONLY WITH ITS OWN DESIRES, FREE OF ALL REGULATORY AUTHORITY. WHEN, IN THE EXPRESS LANGUAGE OF THE PLAN, IT SHALL ELECT TO ABANDON PASSENGER SERVICE, IT MUST BE HELD THAT ITS RIGHT TO RUN PASSENGER TRAINS ON THAT DIVISION TERMINATES. THEREAFTER ITS ONLY POWER IS TO OPERATE FREIGHT SERVICE ON THAT DIVISION.

In legal contemplation the Old Colony Division was devoted to the transportation of passenger and freight. When, by operation of paramount Federal law, the reorganized Railroad is relieved of its legal duty to furnish

passenger service, it follows that its only power thereafter is to continue freight service.

Chesapeake & Ohio Ry. Co. v. *Public Service Comm. of W. Va.*, 242 U.S. 603, 607.

To conclude to the contrary would be to declare the corporate charter was purely unilateral, that is, was binding in favor of the corporation as to all rights conferred upon it and was devoid of obligation as to duties imposed, even although such duties were the absolute correlation of the rights conferred.

Missouri Pacific Ry. Co. v. *Kansas*, 216 U.S. 262, 279.

IV.

POWER TO PERMIT OR DENY TERMINATION OF SERVICE ON INTRASTATE LINES IS RESERVED TO THE SEVERAL STATES IN THE ABSENCE OF FEDERAL ORDERS DISPLACING THAT POWER. THIS POWER IS CUSTOMARILY EXERCISED BY REGULATORY COMMISSIONS. IN MASSACHUSETTS IT IS VESTED IN THE DEPARTMENT OF PUBLIC UTILITIES, SUBJECT TO JUDICIAL REVIEW.

Atlantic Coast Line R.R. Co. v. *No. Carolina Corp. Comm.*, 206 U.S. 1, 19.

Congress through its regulatory commissions has authority to direct the abandonment of intrastate service when its discontinuance imposes an undue burden on interstate commerce, and even the explicit provisions of the Railroad's charter must yield to this authority.

Colorado v. *United States*, 271 U.S. 153, 165.
Transit Comm. v. *United States*, 284 U.S. 360, 369.

Congress has not exercised its power over partial discontinuance of service as distinguished from complete abandonment.

The Interstate Commerce Commission has repeatedly held that this does not confer upon the Commission power to authorize partial discontinuance of rail service.

> *Public Convenience Application of K.C.S. Ry.*, 94 I.C.C. 691, 692.
> *Morris* v. *Essex R.R. Co.*, 175 I.C.C. 49, 52.

It is clear that under Section 77 the rights of the states under partial discontinuance of service as distinguished from complete abandonment remains unimpaired, provided, that the orders of the state's Commission do not impose obligations which conflict with the Commission's order made within its field.

> *Transit Comm.* v. *United States*, 284 U.S. 360, 369.

Subdivision (c)(6) of Section 77 (11 U.S.C. 205(c)(6); Appendix, p. 38) provides that it shall be the duty of the lessee to continue operation on or for the account of the lessor "until the abandonment of such line is authorized by the Commission in accordance with the provisions of Section 1 of Title 49, as amended."

Subdivision (b)(5) (11 U.S.C. 205(b)(5)) provides that the Plan may provide for "the amendment of the charter of the debtor." Authority to amend the charter certainly embraces authority to provide for the termination of passenger service which the charter requires.

Subdivision (f) of Section 77 (11 U.S.C. 205(f); Appendix, p. 38) provides that on confirmation of the Plan it shall be put into effect "the laws of any State or the deci-

sion or order of any State authority to the contrary, notwithstanding." Then and then only under the Act is state authority superseded, and only to the extent specified.

V.

A Court cannot amend, alter or modify a reorganization plan.

We cannot see why a judge should be able to modify the conditions under which the Interstate Commerce Commission has superseded state authority, especially where there is no inherent power in the Interstate Commerce Commission to order partial discontinuance of service.

Only inescapable language could justify a Court in assuming so extreme and unnecessarily provocative a power. In all questions affecting the conflicting interests of the utility and the public, the arbiter is to be the Interstate Commerce Commission rather than the bankruptcy judge. A bankruptcy judge acting alone is not vested with power to abolish or delimit the public service which the utility was chartered to perform.

The specific powers granted the Interstate Commerce Commission negative any authority to authorize partial discontinuance of passenger service; or to vest the bankruptcy judge acting alone to assume that a specific power granted by the Interstate Commerce Commission to abandon passenger service can be modified by him so as to empower the reorganized Railroad to partially discontinue such service.

VI.

WHEN THE RAILROAD HAD ALREADY INVOKED THE JURISDICTION OF THE STATE REGULATORY COMMISSION, THE COURT'S RESERVED POWER DOES NOT PERMIT IT TO PREVENT OR FORESTALL THE DECISION OF THE STATE COMMISSION.

A state commission is empowered to find that a partial or reduced service was required as a matter of public convenience and necessity for the Railroad.

On February 28, 1949, there was no warrant for saying that the Department of Public Utilities of Massachusetts had delayed the proceedings so as to show that it meant to evade any decision. Respect for it and for the Commonwealth required that it should be allowed to proceed as in other cases. Even though the Interstate Commerce Commission had determined that the reorganized New Haven under certain conditions could abandon passenger service, that assumption of paramount Federal authority had not deprived the Commonwealth of Massachusetts of its power to determine what passenger service should be continued so long as the reorganized Railroad had not elected to abandon passenger service.

VII.

THE INTERSTATE COMMERCE COMMISSION, NOT THE COURT, HAS THE PRIMARY RESPONSIBILITY FOR THE CONTENT OF ANY PLAN OF REORGANIZATION, FOR THE ADMINISTRATIVE DETERMINATION THAT COMPRISES IT, AND FOR THE PROPER SOLUTION OF ALL QUESTIONS IN THE PUBLIC INTEREST IN RAILROAD OPERATION THAT ARE INVOLVED IN A PLAN, INCLUDING WHO SHALL OPERATE OR ABANDON WHAT RAILROAD PROPERTY AND ON WHAT TERMS.

Ecker v. *Western Pacific R.R. Corp.*, 318 U.S. 448, 468.

If a state regulatory commission's orders or procedure do not arbitrarily interfere with the operation of the Interstate Commerce Commission, such regulations have never been held unreasonable.

Atchison, Topeka & Santa Fe Ry. Co. v. *R.R. Comm.*, 283 U.S. 380, 395.

VIII.

IN THE DECISIONS OF THE COURT OF APPEALS OF THE SECOND CIRCUIT, AND OF THE UNITED STATES DISTRICT COURT OF CONNECTICUT THERE IS A TOTAL LACK OF FACTS AND FINDINGS ESSENTIAL TO DEMONSTRATE THAT THE ACT OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES, IN DEFERRING THE MARCH 1 DATE FOR PARTIAL DISCONTINUANCE OF PASSENGER SERVICE ON THE OLD COLONY LINES OF THE REORGANIZED NEW HAVEN UNTIL INVESTIGATION, CAUSED OR WOULD CAUSE A SERIOUS AND MAJOR BURDEN UPON THE NATIONAL INTEREST IN INTERSTATE COMMERCE SO AS TO OUTWEIGH WHATEVER STATE OR LOCAL BENEFITS ARE ATTRIBUTABLE TO STATE REGULATION.

Southern Pacific Co. v. *Arizona*, 325 U.S. 761, 769.

Nor can it be held that state regulation conflicts with the intent of the Interstate Commerce Commission or infringes its policy as expressed in the Consummated Reorganization Plan.

Id. at 766.

IX.

REGULATION OF INTRASTATE COMMERCE ON THE OLD COLONY LINES SO LONG AS PASSENGER SERVICE IS PERMITTED UNDER THE CONSUMMATED REORGANIZATION PLAN IS LOCAL IN CHARACTER AND EFFECT AND ITS IMPACT ON THE NATIONAL COMMERCE DOES NOT SERIOUSLY INTERFERE WITH ITS OPERATION. SUCH REGULATION HAS BEEN GENERALLY HELD TO BE WITHIN STATE AUTHORITY.

Southern Pacific Co. v. *Arizona*, 325 U.S. 761, 767.

So. Carolina State Highway Dept. v. *Barnwell Brothers, Inc.*, 303 U.S. 177, 188.

The continued operation of passenger service on the Old Colony Division of the reorganized New Haven must be held to be under the regulatory authority of the Commonwealth of Massachusetts so long as any passenger service is permitted under the reorganization plan.

X.

PARTIAL DISCONTINUANCE OF PASSENGER SERVICE ON THE OLD COLONY DIVISION OF THE REORGANIZED NEW HAVEN RAILROAD IS NOT AN INTEGRAL PART OF THE CONSUMMATED REORGANIZATION PLAN.

The reports of the Interstate Commerce Commission indicate clearly that the Commission originally indicated the losses from passenger service on the Old Colony lines had been so great as to constitute an unreasonable burden on interstate commerce; later it modified its idea of excluding Old Colony from the reorganized Railroad by stating that, if and when losses from passenger service exceeded the critical figures, passenger service might be discontinued. To reason that by the use of that term the In-

terstate Commerce Commission intended to confer power on a Court or the Railroad to discontinue such passenger service thereon as it desired, results in such a material and vital change in the Consummated Reorganization Plan that it permits the Railroad to do exactly what the Commission refused, at the suggestion of the Commonwealth of Massachusetts, to include in the Plan. In its objections to the report of the Joint Committee, the Commonwealth proposed that the Interstate Commerce Commission modify the Plan "to permit no more discontinuance of passenger traffic on the Old Colony properties than is needed to reach the critical figures."

> Fourth Supplemental Report, 254 I.C.C. 405, 421.

In refusing to adopt this proposal, the Commission said:

> "It is likewise clear that to modify materially the provisions of the Joint Report in respect of the Old Colony would be to nullify the compromise agreement reached after extended negotiations with little or no expectation that the suggested modification would prove acceptable to the interested parties."
>
> Id. at 422.

It is therefore conclusive that the Interstate Commerce Commission regarded the proposal of the Commonwealth of Massachusetts as a material modification of the Plan, yet the District Court, some two years after the Reorganization Plan had been consummated, regards a similar proposal by the reorganized Railroad as being clearly within the provisions of the Plan.

The Commission rejected the express provisions for the power now claimed by the New Haven. Therefore it is

reasonable to assume that it decided that this proposal now made by the Railroad would impose an undue burden on interstate commerce. It therefore, under the powers granted to it in Section 77, intended to incorporate in the Plan the provision that, when and if passenger service on the Old Colony Division of the reorganized Railroad caused losses exceeding the critical figures, the reorganized New Haven Railroad must abandon passenger service on that line.

The precise terms of SN(2)(a) and SN(3)(a) give clear warrant that the Interstate Commerce Commission used the term "discontinue" in the sense of abandon or terminate. Further, in neither of those sections, nor in Article XI, Sec. (2)(n), of the final consummation order and decree which reserved jurisdiction to the District Court "with respect to the termination by the Reorganized Company, of passenger service on Old Colony lines," can be found any express or implied reservation or authority to modify the plain intent of the Interstate Commerce Commission.

XI.

Intent of Railroad to Alter Plan.

The action of the reorganized New Haven warrants the inference that its proposal to operate such passenger service on the Old Colony lines as it desires is a recent contrivance. On February 9, 1948, the Railroad notified the Massachusetts Department of Public Utilities of its intention to abandon passenger service on its Old Colony Division as soon as the trial period had elapsed. One year later, in February of 1949, it petitioned the same Department for authority to discontinue certain passenger trains on its Old Colony Division. Early in February of 1949 it admitted by its actions that the Massachusetts regulatory

commission had authority in the matter. Not until the last day of that month did it seek the aid of the Federal District Court of Connecticut. That Court assumed jurisdiction solely on jurisdictional reasoning based on the fact that a greater power ordinarily includes a lesser one.

In rendering its order on the basis of its memorandum of decision (R. pp. 5-12), affirmed by a divided Court of Appeals, a vital and material change was written into the Plan, neither in accordance with the intent of the only authority authorized to override state law, the Interstate Commerce Commission, nor with the true intent of the decisions of this Honorable Court.

Under Section 77 of the Bankruptcy Act the experience and judgment of the Commission must be relied upon for final determination with matters affecting the public interest.

Ecker v. *Western Pacific R.R. Corp.*, 318 U.S. 448.

Group of Institutional Investors v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 318 U.S. 523.

R.F.C. v. *Denver & Rio Grande Western R.R. Co.*, 328 U.S. 495, 508.

XII.

THE COURTS MAY NOT SET ASIDE A PLAN UNLESS FOR CHANGES WHICH WERE NOT ENVISAGED OR CONSIDERED BY THE COMMISSION IN ITS DELIBERATIONS UPON, OR EXPLANATIONS OF, THE PLAN.

R.F.C. v. *Denver & Rio Grande Western R.R. Co.*, 328 U.S. 495, 521, 522.

Insurance Group Committee v. *Denver & Rio Grande Western R.R. Co.*, 329 U.S. 607, 611.

XIII.

UNTIL THE REORGANIZED NEW HAVEN HAS ABANDONED PASSENGER SERVICE ON ITS OLD COLONY DIVISION, POWER TO PERMIT OR DENY CURTAILMENT OF SERVICE IS RESERVED TO THE COMMONWEALTH.

This power is customarily exercised by regulatory commissions. In Massachusetts it is vested in the Department of Public Utilities subject to judicial review.

The state, which granted the Railroad its franchises, may permit it to abandon part of its lines of a single service, such as passenger service, retaining its lines for freight.

And the state may establish regulatory bodies vested with power to determine what constitutes reasonable service.

> *Atlantic Coast Line R.R. Co.* v. *No. Carolina Corp. Comm.*, 206 U.S. 1, 19.
> *Chicago, Burlington & Quincy R.R. Co.* v. *R.R. Comm. of Wisconsin*, 237 U.S. 220, 226, 227.
> *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Comm.*, 279 U.S. 560.

In Massachusetts this power has been vested in the Department of Public Utilities, subject to judicial review.

> Massachusetts General Laws (Ter. Ed.) c. 159, sec. 16; c. 25, sec. 5 (Appendix to this Brief, pp. 40-42).

Massachusetts laws forbid curtailment of passenger service without approval of the Department after notice and public hearing.

> *Department of Public Utilities* v. *Trustees of N.Y., N.H. & H. R.R.*, 304 Mass. 664.

For a state to require such proceedings and continue operations while they are pending does not conflict with the Fourteenth Amendment, and does not impose any undue burden on interstate commerce.

St. Louis-San Francisco Ry. Co. v. *Alabama Public Service Comm.*, 279 U.S. 560.
Palmer v. *Massachusetts*, 308 U.S. 79.

XIV.

OVERRIDING OF STATE LAWS BY GRANTING POWER TO ABANDON PASSENGER SERVICE UNDER A CONSUMMATED REORGANIZATION PLAN UNDER CERTAIN CONTINGENCIES UNDER SECTION 77 SHOULD NOT BE CONSTRUED TO PERMIT SUCH OPERATION OF PASSENGER SERVICE AS THE REORGANIZED RAILROAD DESIRES.

Colorado v. *United States*, 271 U.S. 153, 165.
Palmer v. *Massachusetts*, 308 U.S. 79.

Even though it might be held that under Section 77 the Interstate Commerce Commission could authorize partial discontinuance of passenger service as part of a Consummated Reorganization Plan, such power must be expressed in clear language, or be reasonably deduced from the decisions and discussions of the Interstate Commerce Commission.

XV.

THIS HONORABLE COURT HAS ALWAYS BEEN RELUCTANT TO CONSTRUE THE EXERCISE OF PARAMOUNT FEDERAL AUTHORITY SAVE IN STRICT ACCORDANCE WITH THE EXPRESSED INTENT OF THE PROPER AUTHORITY. IT DOES NOT SEEM REASONABLE THAT THE ORDER PERMITTING A DISTRICT COURT TO INCORPORATE A MATERIAL ALTERATION OF A CONSUMMATED REORGANIZATION PLAN BY JUDICIAL CONSTRUCTION WOULD BE HELD TO BE A VALID EXERCISE OF JUDICIAL POWER.

XVI.

IN THIS CASE THE DISTRICT COURT'S INTERPRETATION OF ITS POWERS AS UPHELD BY THE COURT OF APPEALS—

a. HAS RESULTED IN DEPRIVING THE MASSACHUSETTS REGULATORY COMMISSION OF ALL REGULATION OF INTRASTATE PASSENGER SERVICE ON THE OLD COLONY DIVISION.

b. HAS FREED THE REORGANIZED RAILROAD OF ALL SUPERVISION BY STATE REGULATORY POWER.

XVII.

IT WOULD SEEM UNREASONABLE FOR THE INTERSTATE COMMERCE COMMISSION TO ASSUME JURISDICTION OVER PURELY INTRASTATE MATTERS.

Should it attempt to do so, the Railroad would be justified in questioning its authority. If, however, this Court should be inclined to hold that this question should be considered by the Interstate Commerce Commission because the Commonwealth's power to regulate might interfere with the interstate commerce of the reorganized Railroad, may it be remembered that the original petition of the reorganized Railroad did not make the Interstate Commerce Commission a party to these proceedings.

Respectfully submitted,

THE COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES,

By their Attorneys,

FRANCIS E. KELLY,
Attorney General,

FRANCIS J. ROCHE,
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Assistant Attorney General.

Appendix.

UNITED STATES CODE.

11 U.S.C. 205(c)(6):

(c) *Proceedings after approval of petition.*

After approving the petition:

. . . . . .

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49, as amended.

11 U.S.C. 205(f):

(f) *Binding effect of confirmation; discharge of debtor from liabilities; issuance of securities.*

Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the

purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. The provisions of sections 77a to 77aa of Title 15 shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for

the purposes of said sections, be treated as if they were specifically mentioned in sections 77c and 77d of Title 15, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section 78n of Title 15 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) of this section.

49 U.S.C. (18):

Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.

No carrier by railroad subject to this chapter shall . . . abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future convenience and necessity permit of such abandonment. . . .

MASSACHUSETTS GENERAL LAWS.

G.L. (Ter. Ed.) c. 25:

SECTION 5. When so requested by any party interested, the commission, or any member or members acting for the commission, shall rule upon any question of substantive law properly arising in the course of any proceedings be-

fore the commission or any member or members thereof, and any party in interest aggrieved by such ruling may object thereto, and may secure a review thereof as hereinafter provided. Any failure or refusal of the commission, or of any member or members thereof acting for the commission, to rule upon such a question at the request of any party in interest as aforesaid within ten days after such request, shall be taken and recorded as a ruling adverse to the party requesting the ruling.

The supreme judicial court shall have jurisdiction in equity to review, modify, amend or annul any ruling or order of the commission, or of any member or members representing the commission, but only to the extent of the unlawfulness of such ruling or order. The procedure before said court shall be that prescribed by its rules, which shall state upon what terms the enforcement of the order shall be stayed. The attorney for any party petitioning the supreme judicial court hereunder shall file with the clerk of the court a certificate that he is of opinion that there is such probable ground for the appeal as to make it a fit subject for judicial inquiry, and that it is not intended for delay; and double costs shall be assessed by the court upon any such party whose petition shall appear to the court not to be a fit subject for judicial inquiry or shall appear to be intended for delay. The burden of proof shall be upon the party adverse to the commission to show that its order is invalid. Any proceeding in any court of the commonwealth directly affecting an order of the commission or to which it is a party shall have preference over all other civil proceedings pending in such court, except election cases.

The supreme judicial court shall also have jurisdiction, upon application of the commission, to enforce all valid orders of the commission and the provisions of this chapter and of chapter one hundred and fifty-nine.

G.L. (Ter. Ed.) c. 159:

SECTION 16. If the department is of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the department shall determine the just, reasonable, safe, adequate and proper regulations and practices thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used, and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby. The department may after such a hearing, order any railway company to build and operate any just and reasonable extensions of its lines for which it may have been or may be granted locations and order from time to time that a railroad company shall operate its lines, of standard gauge, or such parts thereof as the department shall prescribe, by electric power instead of steam power, and in its order shall prescribe the time within which the work of electrification shall be done. Before making such order, the department shall consider the relative importance and necessity of the changes in any specific regulations, practices, equipment and appliances proposed to be included therein and of other changes which may be brought to its attention in the course of the hearing, the financial ability of the carrier to comply with the requirements of the order, and the effect of the carrier's compliance therewith, upon its financial ability to make such other changes, if any, as may be deemed by the department of equal or greater importance and necessity in the performance of the service which the carrier has professed to render to the public. Every such common carrier shall obey every requirement of every such order so served upon it, and do everything necessary or proper in order to secure absolute compliance with every such order by all its officers, agents and employees.

FILED
APR 12 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 661.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,

Petitioners.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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New Haven 6, Connecticut.

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Petitioners.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The "Memorandum of Decision, Findings and Conclusions" of the District Court of the United States for the District of Connecticut has not been reported officially, but will be found at R. 5-12.[1] The opinion

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[1] This and similar references are to the "Transcript of Record" which is comprised of the Opinion, Judgment and Clerk's Certificate of the Court of Appeals for the Second Circuit, plus the small portion of the appellate record below that the parties printed in the Appendices to their briefs under that Court's Rule 17. We have been advised, however, that this Court will have

[Footnote continued on following page.]

of the Court of Appeals for the Second Circuit (R. 59 *et seq.*) is officially reported in 178 F. 2d 559.

Jurisdiction.

The judgment of the Court of Appeals was entered December 13, 1949 (R. 77, 78). Jurisdiction of this Court was invoked on February 10, 1950 under 28 U. S. C. A., Section 1254(1) within the time limited by Section 2101(e).

Statement of the Case.

A. Preliminary Statement.

An appeal was taken to the Court of Appeals for the Second Circuit under Sections 24 and 25 of the Bankruptcy Act, as amended (11 U. S. C. A., Secs. 47 and 48), by the Commission of the Department of Public Utilities of the Commonwealth of Massachusetts (hereinafter called D. P. U. or Petitioners) from an Order (R. 3-5) of the United States District Court for the District of Connecticut (Judge Hincks) entered April 25, 1949, in proceedings for the reorganization of The New York, New Haven and

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[Footnote continued from preceding page.]

the entire record in the Court below. In this brief, therefore, the letter "r" followed by a number refers to a printed page in the District Court record included in the record below, and the word "Item" followed by a number refers to numbered items in that record shown in the index we prepared and attached to it before it was transmitted to the Court of Appeals.

Much of the material in the larger appellate record had been printed earlier. A large portion of it has also appeared in the published reports of the Interstate Commerce Commission and in the Federal Reports, both of which are cited in this brief for additional ready reference.

Hartford Railroad Company (hereinafter called New Haven), Principal Debtor, and Old Colony Railroad Company (hereinafter called Old Colony), Secondary Debtor, construing the plan of reorganization "to sanction curtailment of the passenger service on the former lines of Old Colony", and perpetually restraining and enjoining all persons, including the D. P. U., from interfering with the curtailment of that service made on March 1, 1949 by the reorganized New Haven. The Court of Appeals affirmed the Order, one judge dissenting.

The construction of the plan was made by the District Court, and the injunction was entered, pursuant to reservations of jurisdiction in the "Consummation Order and Final Decree" by which the Court retained power to construe the plan as to matters which might require construction [Item 40, r. 13284(d)], and to take such further action as might be necessary to put the plan into effect and carry it out (Item 40, r. 13286),—the plan itself having provided in Section R that the Court's construction of it should be "final and conclusive" (257 I. C. C. at p. 57, Item 34, r. 10921).[2]

The curtailment of Old Colony passenger service was effected on March 1 under provisions in the plan which as a condition to requiring the New Haven to buy the deficit producing Old Colony property had, upon consummation, relieved both companies of any franchise and statutory obligations to operate the service and had substituted therefor a contractual

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[2] Section R states:

> "The construction of the plan by the court shall be final and conclusive. The court shall have the power to cure any defect, supply any omission, or reconcile any inconsistency in such manner and to such extent as may be necessary or expedient in order to carry out the plan effectively."

obligation to operate it only "if and so long as the losses therefrom do not exceed the critical figures provided below" (R. 50, 51, 257 I. C. C. at p. 52, Sec. N(2)(a), Item 34, r. 10910, 10911). The first critical period established by Section N(3)(a) of the plan ended on October 1, 1948 and the plan gave permission to discontinue the service if the losses in that period exceeded the sum of $850,000 (R. 52, 257 I. C. C. at pp. 52, 53, Item 34, r. 10912). The undisputed loss for the period was $3,848,484.62 (R. 11, 17). The contractual obligation to operate the service thus came to an end on October 1, 1948, all provisions of State law requiring operation having been superseded by the plan when it was consummated. Accordingly, the discontinuance was made at a time when all obligation to operate the service had ceased.

B. The Statute.

As we shall show herein, the foregoing plan provisions were devised and carried out pursuant to Section 77(f) of the Bankruptcy Act, as amended [11 U. S. C. A., Sec. 205(f)], the relevant portion of which reads as follows:

> "Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

C. Statement of Facts.

(1) *The commencement of the New Haven reorganization proceedings.*

On October 23, 1935, the New Haven filed its petition for reorganization in the District Court under Section 77 of the Bankruptcy Act, and trustees were later appointed who operated the New Haven system, including the lines of Old Colony which had been leased to the New Haven in 1893 for a term of 99 years (*Palmer* v. *Palmer,* 104 F. 2d 161, 2 Cir., 1939, cert. den., 308 U. S. 590; *Palmer* v. *Warren,* 108 F. 2d 164, 2 Cir., 1939, affd., 310 U. S. 132). On June 1, 1936, the Old Colony lease was rejected because its lines had been operated "at a heavy deficit", and two days later it petitioned for reorganization in the New Haven proceedings as a secondary debtor (*Palmer* v. *Palmer, supra,* p. 162). Thereafter the New Haven trustees were appointed also trustees for Old Colony and continued the operation of the Old Colony lines for the account of that Company (*id.*). By December 31, 1943, the New Haven's prior lien claim against Old Colony on account of this deficit amounted to $6,081,048 (*Old Colony Bondholders* v. *N. Y. N. H. & H. R. R. Co.,* 161 F. 2d 413, 420, 2 Cir., 1947, cert. den., 331 U. S. 858, rehearing den., 332 U. S. 803).

(2) *Early unsuccessful efforts through court action (Palmer* v. *Massachusetts) to reduce the Old Colony passenger service deficits during the reorganization proceedings and thus facilitate reorganization of Old Colony.*

On June 20, 1938, certain New Haven creditors filed a petition in the District Court which resulted in an

order of that Court directing the New Haven trustees to discontinue stops of passenger trains at 88 stations in Massachusetts, most of them on Old Colony lines, but the Court of Appeals reversed the order (*Converse* v. *Commonwealth of Massachusetts,* 101 F. 2d 48, 49, 2 Cir., 1939) and this Court affirmed that reversal (*Palmer* v. *Massachusetts,* 308 U. S. 79, 88 [1939]) on the ground that:

> "it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, *except as part of a complete plan of reorganization for an insolvent road.*"[3]

(3) *Later successful efforts under the doctrine in Palmer* v. *Massachusetts to supersede, through a plan of reorganization, the portion of Massachusetts law that required the continued operation of the Old Colony passenger service.*

In its report and order of March 22, 1940 on the New Haven plan of reorganization (239 I. C. C. 337, 380-382, Item 24, r. 7917-7921) Division 4 of the Commission concluded that the acquisition at that time by the New Haven of the Old Colony properties and the assumption of responsibility for their future operation might impair the ability of the New Haven to render

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[3] As authority for the exception this Court quoted Section 77(f), *supra.* It added, page 89, that "Perhaps . . . amenability to state laws will serve as incentive to the formulation of reorganization plans which, on approval by the Commission, *do supplant state authority.*"

All emphasis herein is supplied unless otherwise noted.

efficient, economical and safe service on the remainder of its system inasmuch as the deficits from Old Colony passenger service would impose too heavy a financial drain on the system. See also 239 I. C. C. at p. 443, r. 7990. However, upon representations in petitions that large savings had been and would be effected in the operations of the Old Colony the Commission reopened the proceedings (261 I. C. C. 195, 202, Item 37, r. 11692); and by its First Supplemental Report and Order of February 18, 1941 (244 I. C. C. 239, Item 25, r. 8040), it authorized the acquistion of the Old Colony as a part of the New Haven plan of reorganization. That report provided, however, that the acquisition would be authorized only upon the condition that the New Haven would be permitted to abandon passenger service on the so-called Boston Group of Old Colony lines under certain conditions (p. 265, r. 8070; p. 298, r. 8112). These conditions were, as stated by the Court below, that

> "the Commission should estimate the average yearly loss and yearly savings for the years 1941 and 1942, or 1941 to 1945, if the Old Colony properties had not been operated as a part of the New Haven system, and that if the estimate as to the average yearly savings did not exceed the average yearly loss by an amount equal to the annual contingent interest charges on the income bonds issued in acquisition of the Old Colony properties, then 'the principal debtor or its successor shall thereafter be under no obligation to continue passenger service on the Boston Group of the Old Colony * * *' 244 I. C. C. 239, 263-65" (R. 61, 62).

The Commission noticed that the public authorities and communities were then keenly alive to the danger

that passenger service on the Old Colony lines might be discontinued in whole or in part, that they were cooperating earnestly in an effort to improve the situation (p. 264, r. 8069), and that possibly the charges in connection with the use of the South Station, which were responsible for part of the passenger service deficit, might be reduced in one way or another (p. 257, r. 8060).

When the plan came before Judge Hincks, he refused to approve an involuntary merger of the New Haven and the Old Colony on the terms proposed (Opinion on Plan, December 8, 1941, r. 8923, 8956, Item 27). His reason, among others, was that the New Haven would be required to acquire and pay for the Old Colony property without any effective assurance that the deficits from the passenger service would be eliminated or offset by other factors (r. 8956); and he pointed out that the provisions in the plan with respect to the passenger service were not adequate, practically or legally, to assure the elimination or reduction of the passenger service losses that the Commission itself had said was essential to any sound plan for the reorganization of the Old Colony (r. 8947). He concluded by commending to the Commission's consideration the Compromise Committee's report which suggested a solution of the service problems (r. 8956-8964).

In the Third Supplemental Report and Order of the Commission, issued October 6, 1942 (254 I. C. C. 63, Item 28, r. 9759), the Commission took full advantage of this Court's ruling in *Palmer* v. *Massachusetts, supra,* and provided that the New Haven and Old Colony should be relieved through the plan of all statutory and franchise obligations to operate the losing passenger service, with proviso that upon such relief the reorganized company should undertake a

contractual obligation to operate the service if and so long as the losses did not exceed the critical figures which the Commission established. Accordingly, in the latter part of 1942, the Commission cast the service provisions in substantially their final form and it has adhered to them since.

In its Fourth Supplemental Report and Order of July 13, 1943 (254 I. C. C. 405, 419, *et seq.*, Item 29, r. 10129, 10151, *et seq.*), the Commission made slight changes in the service provisions (pp. 422, 423, r. 10156, 10157), but refused to depart from its basic concepts, stating (p. 422, r. 10155) that the losses from the passenger traffic on the Old Colony had materially contributed to the difficulty of including the Old Colony in the New Haven's reorganization and that undoubtedly the efforts to include it had delayed that reorganization. In its opinion dated December 21, 1943 on the Fourth Supplemental Order, the District Court dealt at length with the service provisions (*In re N. Y. N. H. & H. R. R. Co.,* 54 F. Supp. 595, 614, *et seq.,* Item 33, r. 10695, 10728, *et seq.*), approved them and made certain constructions of them which the Commission itself approved in its Fifth Supplemental Report and Order of February 8, 1944 (257 I. C. C. 9, 17, Item 34, r. 10845). This was followed by the Court's opinion on the plan dated March 6, 1944 re-affirming its earlier rulings (54 F. Supp. 631, 635, Item 36, r. 11024, 11028). The Court of Appeals sustained the service provisions in 1945 (*In re N. Y. N. H. & H. R. R. Co.,* 147 F. 2d 40, 51, cert. den., *Commonwealth of Mass.* v. *The N. Y. N. H. & H. R. R. Co.,* 325 U. S. 884, rehearing den. 326 U. S. 805), saying in part:

"Whether the curtailment of service is required

> in the public interest was a matter for the Commission to decide. The general public interest of keeping an interstate railroad running must override the local public interest of Massachusetts if the Commission thinks the two incompatible. The contention is not persuasive that the Commission lacks the power by means of a plan of reorganization to amend the charters of New Haven and Old Colony or to relieve them of performing passenger service unless the state authorities give consent."

That Court relied on the language of Section 77(f) which we quoted in subdivision B, *supra,* of this brief and upon *Palmer* v. *Massachusetts, supra.* Its ultimate conclusion was "that a plan approved by the Commission may override state laws which the Commission finds incompatible with the plan it deems fair and equitable and in the public interest." The Court of Appeals, however, reversed the District Court's order of approval, and provided for a remand of the Old Colony features of the plan to the Commission, because it doubted whether the Commission had exercised its own independent judgment in determining the value of the Old Colony property and the price to be paid therefor.

In its Sixth Supplemental Report and Order of May 14, 1945 (261 I. C. C. 195, 202-204, Item 37, r. 11692-11694) the Commission adhered to the plan contained in the Fifth Supplemental Report and Order, *supra,* after having outlined the history of the passenger service provisions. Approval and confirmation followed in the District Court on August 31, 1945 (Item 39, r. 11891) and the Court of Appeals affirmed on January 13, 1947 (*Old Colony Bondholders*

v. *N. Y. N. H. & H. R. R. Co.*, 161 F. 2d 413). The "Consummation Order and Final Decree" was entered on September 11, 1947 (Item 40, r. 13249, *supra*), effective September 18, 1947 (Item 41, r. 13318); the Commission gave its approval (Item 42, r. 13319), and the Old Colony property was acquired and paid for by the New Haven under the plan of reorganization by deed dated as of September 18, 1947 (Item 43).

(4) *History of the operation of Old Colony passenger service by the New Haven (a) from September 18, 1947 to October 1, 1948 under the contractual obligation imposed by the plan following termination of franchise and statutory obligations and (b) from October 1, 1948 to March 1, 1949 after termination of the contractual obligation and during the period in which the New Haven, at the request of the Commonwealth, had agreed to extend the time for discontinuance.*

With the consummation of the plan as of September 18, 1947, the reorganized New Haven commenced to operate the Old Colony passenger service on a contractual basis for the twelve consecutive calendar months thereafter as provided in Sections N(2)(a) and N(3)(a) of the plan, the franchise and statutory obligations to operate it having ended; and the New Haven continued to furnish monthly statements of the loss both to the Governor of Massachusetts and to the D. P. U. as it had done since October, 1946 (Item 5, pp. 67-69). The loss figures left no doubt in the minds of anyone that on October 1, 1948, all obligation to operate the service would come to an end (Item 5, pp. 67-70; R. 17, par. 2; Item 7, pp. 5, 6, 15). Accordingly, before the October 1, 1948 deadline, the Governor of Massachusetts requested the New Haven to extend the time for discontinuance until March 1,

1949, which was done by the New Haven's Board of Directors upon the understanding that the rights of the company under the plan would remain unimpaired (R. 17, par. 2).[4]

On February 8, 1949, the New Haven's President released a statement, which had wide publicity and was discussed with the D. P. U., stating that on March 1 the Railroad would discontinue operation of (a) forty-five trains then operated Monday to Friday, inclusive, on the former Old Colony lines, (b) forty-one trains operating on Saturdays only, and (c) twenty-eight trains operating Sundays only (R. 17, 23). The remaining trains not scheduled for discontinuance handled over 80% of the public still using train service in the Old Colony area and it was believed that such remaining trains could handle about 90% of the public without undue change in their travelling habits (R. 23).[5] The decision was reached after a study of the riding on individual trains which indicated an increasing lack of public patronage on the ones scheduled for discontinuance on March 1 (*id.*). The purpose of discontinuing only some of the trains was to meet the situation with the least inconvenience to the public (*id.*).

On or about February 10, 1949, the Chairman of the D. P. U. requested the Attorney General for an

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[4] This reference is to the New Haven's petition to the District Court for construction of the plan and for an injunction. D. P. U. admitted all allegations of fact in the petition, and the correctness of all exhibits thereto, by failing to deny them in the answer it filed [R. 32, 33; F. R. C. P. Rule 8(d); see also Rules 8(b) and 10(c)]. On the record, the District Court found the facts to be as stated in the petition (R. 6). This situation should be borne in mind in connection with all statements in this brief supported by citation from the petition.

[5] Actual experience after the discontinuance showed that despite it 86% of the passengers formerly accommodated on all trains were being handled on the trains that remained (Item 5, p. 104).

opinion as to the legal rights of the Commonwealth in the premises, and on or about February 24, 1949 a copy of that opinion was made public (R. 18, par. 4). In it he stated that on the record the losses specified in the plan had been exceeded and that the authority to abandon all the service had been settled by the courts. He stated, however, that the problem posed by the D. P. U.'s question "has to do with partial operation of service" and he concluded that D. P. U. should compel the New Haven to comply with the provisions of State law. Curiously enough he relied for his conclusion upon *Palmer* v. *Massachusetts, supra,* upon which, as noted, the Court of Appeals, the District Court and the Commission had relied for the proposition that the State law was superseded by the plan.

On February 25, 1949, D. P. U. issued a statement in which it said that it would not interfere with the reductions (R. 18). Three days later, however, and at 4:45 P. M. on the last day before the new schedule became effective, the New Haven was notified that D. P. U. had issued or was about to issue a stop order, the purpose of which was to prevent the reductions in service on March 1.[6] It was then that the New Haven obtained from the District Court a restraining order temporarily restraining D. P. U. and others from interfering with the proposed reductions in service (R. 5, 18, Item 2).

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[6] A copy of the stop order as actually entered on February 28 appears in the record as Item 10. It orders that the service then being furnished on the Old Colony Division be continued in effect and that the proposed curtailment be deferred pending investigation and public hearing.

(5) *Court proceedings with respect to the Old Colony passenger service on and after March 1, 1949.*

On the next day (March 1) the New Haven filed its petition for construction of the plan and for a permanent injunction (R. 14) alleging, *inter alia,* that question appeared to exist in the minds of certain Massachusetts authorities as to the right of the Company to do less than abandon all the passenger service on the former Old Colony lines (R. 17); that the interference contemplated by D. P. U. through its stop order was apparently based on a misconstruction of the plan provisions with respect to the passenger service; and that such interference would prevent the service provisions from being put into effect (R. 19). The petition was fully heard and argued orally on March 8, 1949 (Item 5); and briefs and reply briefs were filed by the parties (Items 15, 19, 20; R. 6, 11, 34; Item 5, pp. 124, 125) on the very full record now before this Court. About five weeks later (April 14) the District Court filed its Memorandum of Decision (R. 5, 12), and on April 25 it entered the order thereon (R. 3-5) which is the subject of the D. P. U.'s petition to this Court.[7]

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[7] Compare the following statement of Judge Clark at the conclusion of his dissenting opinion (R. 77):

> "But if there is any value in appellate review at all, it must be in the deliberative approach afforded on full records, briefs, and arguments and not available to a district judge *faced of an afternoon* with a real crisis in railroading forced upon him by the precipitate and last-minute action of this commission. Moreover, in the lonely task of judicial adjudication, each of us must finally act as his own faculties demand. I would reverse for the purposes indicated."

D. Questions Presented.

All of the nine "Questions Presented" at pp. 3-6 of the petition state in different language a single question of law whether or not a bankruptcy court may make a material alteration in a consummated railroad reorganization plan after the Commission has refused to make such an alteration in it. This, according to the brief (p. 23), is the "real question" raised by the petition.[8]

The only possible answer to that question is no, for it is a commonplace that the Commission makes the plan and that the Judge cannot change or enlarge it either before or after consummation. He can, however, say what a plan means when anyone attempts to prevent it from being carried out because of lack of knowledge of its content, misconstruction of it, or wishful thinking as to its meaning. That is what he did in the present case after petitioners had ordered respondent to continue the passenger service then being furnished on Old Colony lines (Item 10) despite the plan provisions which gave respondent the undoubted right to discontinue all the service. This gave rise to the question in the Court below whether or not Judge Hincks abused his discretion in refusing to adopt D. P. U.'s "all or nothing" construc-

[8] The "real question" is distinguished by the draftsman from the "various questions" that "are set forth in full in the petition" (p. 23). Questions 1, 2, 3 and 8 are expressly based on an assumption that the District Court changed the Commission's plan. The same assumption is implicit in question 5 through the statement that the railroad made no averment of "subsequent changes in conditions" and no request or re-examination of the plan by the Commission. That assumption is likewise implicit in questions 4, 6 and 7 though they are so general as to be practically meaningless. As applied to the facts in this case, question 9 is not understandable. Compare, however, the closing statement of the Court below (R. 68).

tion of the passenger service provisions in the plan of reorganization and in his consequent holding that the New Haven, on March 1, 1949, could take off part of the service and continue the portion that served 86% of the public,—the plan having relieved the New Haven, prior to March 1, 1949, of every conceivable obligation, whether through franchise, statute or contract, to operate the service.

Petitioners might have asked this Court specifically to pass upon the meaning of the plan despite the findings of both Courts below that plainly it did not require the Railroad either to run all the passenger service on the Old Colony lines or immediately to deprive the citizens of Massachusetts of all that service. However, they have not asked this Court that question. Instead their petition assumes, contrary to the fact, that the District Court altered the plan, and this Court is asked to review the well settled rule that a District Court cannot do so.[9] This Court's Rule 38(2) states that "Only the questions *specifically* brought forward by the petition for writ of certiorari will be considered."

We, therefore, do not believe that either the petition or the supporting brief presents any substantial question to this Court under its rules relating to certiorari. At most a question as to the plan's meaning may be said to lurk in such of the "Questions Presented" (pp. 3-6) as assert that the District Court changed its meaning and also in the well settled but inapplicable rules of law that Petitioners say are involved (*ibid.*). Likewise a question as to the plan's meaning is possibly implicit in the statement that "Section 77 authorizes the amendment of the railroad's charter and the superseding of State charters

[9] The Court below pointed out (R. 68) that the rule is "of course, sound law, but wholly inapplicable."

and laws only as they are made an integral part of the plan of reorganization, first approved by the Interstate Commerce Commission" (p. 24) and that "the only power vested in the [District] Court is to see that the Plan is carried out according to its true intent" (p. 17). See also the statement at page 27 that a State's control over partial discontinuance of passenger service is paramount unless it conflicts with the order of the Interstate Commerce Commission "made within its field", viz., pursuant to a plan of reorganization.[10]

Petitioners do indeed argue at one point in their brief (pp. 31-33) that partial discontinuance of passenger service is not permitted under the plan because the Commission refused the Commonwealth's request "to permit no more discontinuance of passenger traffic on the Old Colony properties than is needed to reach the critical figures" (p. 32). Thus they do raise a question as to the plan's meaning, but without including that question specifically in their "Questions Presented" and without any real analysis of the plan's provisions in support of their position that the Commission's refusal to permit any limitation on the right to discontinue amounts to a positive command that all the service should be discontinued. However, we will cover in this brief the question as to the plan's meaning that was presented to the Court below despite the conspicuous absence of that question from the "Questions Presented" at pp. 3-6 of the petition.

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[10] Thus Petitioners have accepted the rule in *Palmer* v. *Massachusetts* for the purposes of this case.

ARGUMENT.

POINT I.

The petition should be denied because the ground upon which it is rested was not raised in either of the Courts below, and, moreover, is flatly inconsistent with Petitioners' claim in both those Courts.

Petitioners' claim in the District Court was that under the plan respondent must either continue all the passenger service or take it all off (Item 5, pp. 29, 30; see also p. 20).[11] The District Court dealt with and overruled that claim in its memorandum of decision (R. 8, 9). Petitioners then pressed the same claim as to the plan's meaning on the Court of Appeals, as evidenced by that Court's statement that "The Commonwealth of Massachusetts now makes the rather startling contention that these [plan] provisions mean that the New Haven must either discontinue all of the Old Colony passenger service or not discontinue any of it . . ." (R. 66). The Court below added that "To give such meaning to them [the plan provisions], however, would be unreasonable." Thus in both Courts below Petitioners' claim was that the reorganized company under the plan could either take off all the passenger service or continue to run all of it when the critical figures were exceeded, and that as a consequence it could not under the plan continue "only . . . .the most used and useful part of the service" (Petitioners'

[11] Petitioners' attorney said, in addition, "That is our exact position, your Honor, the position of the Attorney General of the Commonwealth" (Item 5, p. 30).

Answer in the District Court, Item 13, p. 3). Both Courts passed on that claim, and on no other claim.

However, Petitioners now say for the first time in their "real question raised by this petition" that "the expressed intent of the Interstate Commerce Commission" in the plan was "to *order* abandonment of passenger service on the Old Colony Division of the reorganized Railroad on the happening of certain contingencies" (Brief, pp. 23, 24), which contingencies, of course, were the exceeding of the critical figures.[12] Thus Petitioners are asking this Court by certiorari to review the decision below because the Court of Appeals did not hold that under the plan the railroad must take off all the service; but in both Courts below Petitioners' claim as to the meaning of the plan was flatly inconsistent with the claim here advanced for the first time as the ground for reversal.[13] If this Court ordinarily will not reverse for alleged errors not called to the attention of the Court below (*Robinson & Co.* v. *Belt,* 187 U. S.

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[12] This shift of ground cannot be laid to inadvertence or to typographical error, for Petitioners say also at page 33 of their Brief that:

> "It [the Commission], therefore, under the powers granted to it in Section 77, intended to incorporate in the Plan the provision that, when and if the passenger service on the Old Colony Division . . . caused losses exceeding the critical figures, the reorganized New Haven Railroad *must* abandon passenger service on that line."

Moreover, at page 15 of the petition it is stated "that in strict compliance with the provisions of the Reorganization Plan the railroad *must* abandon passenger service", and that after the critical figures had been exceeded "the railroad *could no longer operate* passenger service on the Old Colony Division."

[13] It will be remembered that on February 28, 1949 these Petitioners ordered Respondent to continue the very same passenger service that they now say Respondent should have taken off (Item 10), and that the present controversy was precipitated by that last-minute order.

41, 50; *Husty* v. *U. S.*, 282 U. S. 694, 701, 702; *Adams* v. *Mills*, 286 U. S. 397, 416, 417), we should hardly suppose it would grant certiorari for the purpose of considering a claim that is not only new, but is also inconsistent with a claim made in both Courts below.

POINT II.

The petition should be denied because the District Court's construction of the plan of reorganization was final and conclusive, no abuse of discretion being shown.

The present record shows good reason for the provision in Section R of the plan (257 I. C. C. at p. 57, Item 34, r. 10921) making the District Court's construction of it "final and conclusive." Judge Hincks was familiar with the early unsuccessful efforts to reduce the Old Colony passenger service deficits during the reorganization proceedings (*Palmer* v. *Massachusetts, supra*), and he himself took the initiative in having a committee formed to propose a solution of the Old Colony passenger service problem which was preventing the reorganization of that Company (Item 27, r. 8958; see r. 8956-64),—a solution that was ultimately embodied, with minor changes and additions, in the provisions of the approved plan that are involved in this case. Throughout the proceedings, as we have seen, the Commission and the Court worked cooperatively on these very provisions, and this Court will doubtless agree with the Court below (R. 65) "that matters of construction fall within the scope of district court discretion, no abuse of which has here been shown." If it does so agree, there would be no

need for this Court to grant the petition in order that it might determine whether or not a majority of the Court below was correct in the determination that "the construction put upon the plan by the [District] court . . ." was "*plainly* correct" (R. 65).

This is not to suggest that we think the meaning of the plan is not clear. On the contrary, it is our view that an abuse of discretion would have been involved in any holding that the New Haven could not, on March 1, 1949, continue the portion of the service that accommodated 86% of the travelling public. We mention the rule as to discretion only because it applies equally in cases involving either a plain meaning or an ambiguity. Indeed, an analogous rule was applied by this Court in *Institutional Investors* v. *Chicago, M. St. P. & P. R. R. Co.*, 318 U. S. 523, 564 [1942], where this Court said:

> "But we are not performing the functions of the District Court under §77(e). Our role on review is a limited one. It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end."

The analogy is close inasmuch as the District Court passes on the matter of fairness and equity under subdivision (e), and under subdivision (f) the plan is to be carried out "under and subject to the supervision and control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

POINT III.

The District Court and the Court of Appeals were plainly right in holding that on March 1, 1949, the New Haven could take off part of the passenger service on the former Old Colony lines and continue operation of the remaining part that served 86% of the public.

A. Before March 1, 1949, the plan of reorganization had relieved the New Haven and Old Colony of every conceivable obligation to operate any part of the service.

Normally the State authority, not the Interstate Commerce Commission, is supreme where a carrier by railroad wishes to discontinue all or any part of its local passenger service without abandoning its entire operation or properties at the point in question under Section 1(18)-(20) of the Interstate Commerce Act. In Massachusetts, as elsewhere, the obligation to keep passenger service running stems either from the carrier's charter or from State regulatory statutes (compare *Commonwealth* v. *Fitchburg R. Co.*, 12 Gray (Mass.) 180 [1858] with *Brownell* v. *Old Colony R. Co.*, 164 Mass. 29, 32 [1895], and see *Palmer* v. *Massachusetts, supra,* p. 82, n. 2 and pp. 84, 85, n. 6). Because of this, prior to the Consummation Order and Final Decree in the New Haven-Old Colony proceedings, passenger service on Old Colony lines was operated successively by the New Haven (Debtor) and the trustees of its property pursuant to the requirements of State law that the service could not be diminished without State regulatory approval. But a complete plan of reorganization under Section

77(f) of the Bankruptcy Act may supersede that law (*Palmer* v. *Massachusetts, supra,* pp. 88, 89), as was done deliberately with respect to the passenger service in the very first sentence of Section N(2)(a) of the plan (R. 50).

The sentence states that "The charter of the reorganized company and of Old Colony shall be amended, and the franchises and statutory obligations of the reorganized company and of Old Colony shall be amended or superseded so that neither road will be under any *obligation* to operate passenger service on Old Colony lines". There is a period after the sentence, it is complete in itself and it erased all requirements of State law that the service be continued after consummation. But in order to require continuation of the service without change after consummation and during a trial period, Section N(2)(a) of the plan goes on to provide that the reorganized company shall "undertake a *contractual obligation* to operate for its own account passenger service on Old Colony lines if and so long as the losses therefrom do not exceed the critical figures provided" in another subdivision of the plan.[14] They were exceeded on October 1, 1948, and had they not been, the New Haven would have been obligated under the plan and its contract to continue operation of the service despite the earlier termination of all obligation under State law to operate it.

But for present purposes the successive changes wrought by the Commission in the nature and source of the obligation to operate the service are much

[14] The agreement was to take the form of a stipulation by the reorganized company before the Court, which stipulation was executed and approved (Item 44).

less important than the fact that the Commission's intention, clearly stated at this point in the plan, was merely to remove the obligation to run the service and not to issue any positive command that all or any part of it be taken off. Stated otherwise, and in general terms, the right to do something does not come to an end simply because all obligation to do it has ceased. If the Commission had intended to order cessation of the service it would have done so (compare Petitioners' brief, p. 33).

B. There is nothing in the words "may be discontinued" in Section N(3)(a) of the plan that suggests either a command to remove all the passenger service, or a prohibition against partial discontinuance of it, upon termination of the contractual obligation to operate it. Any thought that service must be taken off is negatived by the word "may".

As soon as the Commission, in Section N(2)(a) of the plan, had put an end to the requirements of Massachusetts law with respect to operation of the passenger service, and had provided for the termination of all obligation to operate the service if and when the critical figures were exceeded, it had established an effective control in the reorganized railroad over the quantum of service by removing any and all obstacles to the exercise of such control. Accordingly the "salient provisions pertinent to the issue here raised" are to be found in Section N(2)(a) of the plan and not in the later subdivision [Section N(3)(a)] which says that the service "may be discontinued" if the critical figures are met (compare Petition, p. 12). The earlier subdivision is the primary source of power: it ended all obligation under

Massachusetts law and substituted a contractual obligation which was to last only "if and so long as the losses" did not exceed those later to be specified. The words in the later subdivision, viz., "passenger service on Old Colony's lines may be discontinued if", and indeed the entire sentence in which they occur, is thus seen to be merely introductory to the Commission's precise specification of critical periods and critical figures which must be met in order to terminate the contractual obligation. Basically Section N(3)(a) is a yardstick and the words "may be discontinued" were used in recognition of the power that had already been granted in the plan.

But even if the words "may be discontinued" are viewed as a primary source of power, quite apart from the earlier plan provisions, it would still be true that the words contain no prohibition against voluntary operation of part of the service after all of it could be taken off. And surely *permission* to give up or put an end to the passenger service does not amount to a command that all of it must be taken off (compare the petition and brief, pp. 15, 23, 24, 33) or contain any implication that part of it may not be given up. Indeed Petitioners have found it necessary to overlook the discretionary word "may", and to argue from the word "discontinued" alone, in attempting to support their present claim that discontinuance of all the service became mandatory when the critical figures were exceeded.

Judge Clark's approach in his dissenting opinion was similar. Without considering the word "may" at all, he looked up the word "discontinue" in Webster's Dictionary and thought that it pointed to the "decisive" and "clean-cut step" of abandonment of all

the passenger service (R. 73).[15] Furthermore, he again overlooked the word "may" when he said (R. 74) "About the only thing looking in this direction", viz., in the direction of a "choice" between continuing or abandoning the service, was the provision as to the option giving Massachusetts the right to buy the Braintree line at salvage value if the Railroad " 'shall elect' to discontinue the service." And neither Judge Clark nor Petitioners have noticed how well the discretionary word "may" in Section N(3)(a) of the plan fits with the earlier language which instead of issuing any order merely removed "any obligation to operate passenger service." The right to run all or any part of the service is in no way affected by the removal of all obligation to run it and the grant of discretion in taking it off buttresses that conclusion.

Indeed to support the identical conclusions of both Courts below it seems hardly necessary to do more than to read the sentence in the plan removing "any obligation to operate passenger service on Old Colony lines" (R. 50) and the sentence thereafter stating that the service "may be discontinued if" the critical figures are exceeded (R. 52). However, though not vital to the validity of such conclusions, it is nevertheless interesting to know that there is evidence in

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[15] Judge Clark expressly disclaimed any intention himself to put forward "a final and definitive interpretation of the plan or answer to the problem" (R. 70, 74) because he thought that should not be attempted until "other interests, particularly the I. C. C., have been heard from." The Commission, however, did not appear or file any brief as *amicus curiae* or otherwise, either in the District Court or Court of Appeals, although it undoubtedly received immediately from the Clerk of the Court the various papers that were filed in the District Court, including our petition, the notice of later hearing, the memorandum of decision and the order of the District Court (General Order in Bankruptcy No. 49). Moreover, the District Court's order was entered on a full record and after full discussion (compare R. 74).

the record supporting the view that the word "discontinued" was thought from the beginning by all concerned, including the Commonwealth and the Commission, to mean "discontinued in part" as well as "discontinued in its entirety." At pages 61-64 of the record the Court of Appeals made an extensive review of the history of the plan provisions, and, at pages 66, 67, it summarized that history in answering D. P. U.'s then argument that under the plan the reorganized company had only the mutually exclusive rights (a) to run all the service, or (b) to take all of it off.[16]

The Court below also thought that the inclusion in Section N(3)(a) of the plan of the option in the Commonwealth to purchase the Boston-Braintree

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[16] The summary is repeated here for the convenience of this Court:

> "Indeed, the above recital of the background of this case shows that, when the Commission first made acquisition of the Old Colony properties a part of the plan, and first provided that [fol. 69] the reorganized company should be under no obligation to continue passenger service on Old Colony lines, it noted that the public was 'alive to the danger that service may be discontinued, in whole or in part . . .' 244 I. C. C. 239, 264. It further stated that it had the power to authorize as part of a complete plan of reorganization for an insolvent road 'a matter . . . such as the complete or partial discontinuance of passenger service,' as well as power, under Section 1(18) of the Interstate Commerce Act, to authorize abandonment of all of a given line. *Ibid.* Indeed, the Commission subsequently noted that the Commonwealth of Massachusetts itself considered that under the plan 'apparently curtailments could be made on all the Old Colony lines.' 254 I. C. C. 405, 421. Thus, the word 'discontinued' was thought from the beginning by all concerned to mean 'discontinued in part' or 'curtailed' as well as 'discontinued in its entirety.' While it is, perhaps, not of great significance, we thought similarly, for in *In re New York, New Haven & Hartford R. Co., supra*, we referred to 'the curtailment of service' allowed by the plan."

segment in the event of an election to discontinue passenger service on Old Colony lines was not of great interpretative significance inasmuch as the option was inserted in the plan at the request of the Commonwealth "after the New Haven's right to discontinue service had been fully crystallized" (R. 67). The Court added, however (R. 67), that the request for and grant of the option

> "would seem to indicate, not that they [the Commonwealth] were not interested in the public using the 'Western' and 'Cape' group lines, but, if anything, that they thought it likely that any discontinuance of service would take place, if at all, with respect to the segment of the lines which had in the past shown the largest operating deficits, and thus recognized that discontinuance could, and probably would, be a partial affair."

As we have shown (Point I, *supra*), Petitioners are now claiming that under the plan all of the passenger service "must" be discontinued. As a matter of fact the plan and the record will be searched in vain for any such peremptory requirement. Beyond this it is significant that the opinion given Petitioners by the Honorable Francis E. Kelly on or about February 24, 1949 (R. 27), states only that Respondent had "authority" to discontinue the service.[17] And any idea of a peremptory construction of the plan is negatived by the Governor Bradford request to the New Haven in 1948 that it extend the date for discontinuance to March 1 of the following year (R. 17).

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[17] He and others on his staff signed the petition and supporting brief filed in this Court.

C. Petitioners are in error in stating that prior to approval of the plan the Commission refused to provide in it for curtailment of Old Colony passenger service.

Petitioners say in their brief (pp. 2, 3) that any idea of curtailing the service was "expressly repudiated, by the Interstate Commerce Commission prior to approval of the Reorganization Plan as finally consummated."[18] As the Court below pointed out, the only basis for the argument lies in the rejection of the Massachusetts proposal to the Commission to "permit no more discontinuance of passenger traffic on the Old Colony properties than is needed to reach the critical figures" (R. 67; 254 I. C. C. at p. 421). First, and on its face, the Commonwealth's proposal was to engraft a limitation on the right to discontinue and the Commission simply refused to impose any limitation. Thus Petitioners' argument at this point really is that a limitation preventing the right to remove some of the service may be implied from the Commission's refusal to allow any limitation. The Court below found no basis for any such implication (R. 67); and Judge Clark apparently mis-read the proposal when he said that "This was an endeavor

[18] They make their argument at pp. 31-33; see also pp. 8, 14, 17, 22 and 23. In claiming in the Court of Appeals and here that the Commission repudiated any thought of partial discontinuance, Petitioners have again shifted ground. They said in their brief filed in the District Court (Item 19, p. 8):

> "As power to override state laws is vested solely in the Interstate Commerce Commission, *it cannot be fairly argued* that in passing on the provisions as to termination or cessation of passenger service, that the Interstate Commerce Commission *even considered partial discontinuance* of passenger service on the Old Colony and the Court would not be justified in making such assumption."

to have the plan *authorize* exactly what the New Haven now claims it has discretionary power to attempt" (R. 72). The proposal was not one to "authorize" anything despite the word "permit" that is found in it. Instead the substance of the proposal was to *prevent* any discontinuances below the amount needed to reach the critical figures. In the second place, the words "no more discontinuance" imply verbally that the word "discontinuance" is broad enough to include discontinuance in whole or in part, and the word "permit" was evidently used in recognition of the discretionary word "may".

D. The petitions for authority to curtail passenger service which were filed with D. P. U. by the New Haven during the first critical period are irrelevant in the present case.

During the first critical period, viz., on September 22, 1947 and February 9, 1948, the Railroad filed petitions for authority to make certain curtailments in passenger service (Item 5, pp. 8, 99).[19] It was then operating the service under the contractual obligation and was not free to take any of it off without permission. Therefore the petitions were filed as the only means of bringing about economies before the critical date, and they constituted no recognition of D. P. U.'s jurisdiction over the quantum of the service *after* the expiration of the critical period (compare D. P. U.'s brief, pp. 33, 34). However, in both its petition and supporting brief D. P. U. has changed

[19] It will be remembered that all franchise and statutory obligations to operate passenger service ended on September 18, 1947 when the plan was consummated and that the contractual obligation to operate the service ended on October 1, 1948 when the losses from the service exceeded the critical figure for the first critical period.

the date of the filing of the last petition from February 9, 1948, when it was actually filed, to "early in February of 1949" (pp. 10, 33) and has then made its present argument that the reorganized company invoked a jurisdiction that it now denies. Moreover the statement of facts in D. P. U.'s petition (p. 10) is so drawn as to create an impression that the stop order of February 28, 1949 was entered upon a petition of the reorganized company filed "early in February of 1949" for authority to make curtailments.[20] No such petition was filed, and the record will show that the stop order was entered because of the New Haven's announcement on February 8, 1949 that on March 1, 1949 it would discontinue operation of the forty-five Monday-Friday trains, the forty-one Saturday only trains, and the twenty-eight Sunday only trains (R. 17, 23; Item 10).

E. Petitioners are in error in stating that the District Court's construction of the plan deprived Massachusetts of all regulation of intrastate passenger service on the Old Colony Division.

D. P. U. contends in its brief that the result of the District Court's order was to deprive the Commonwealth of all regulatory power over intrastate passenger service on the Old Colony Division (Brief, p.

[20] The petition in this Court states (p. 10):

> "Early in February of 1949 the New Haven Railroad petitioned the said Department of Public Utilities for authority to curtail passenger service on the Old Colony Division. On February 28, 1949, the Department of Public Utilities, in accordance with the statute, Mass. G. L. (Ter. Ed.) c. 160, § 128, ordered the New Haven to continue unchanged the passenger schedule theretofore in effect on said Old Colony Division pending investigation and hearing."

37); see also pp. 8, 9 and 15.[21] That argument can no doubt be traced to Judge Clark's dissenting opinion below (R. 68, *et seq.*). He said in unequivocal language that the result of the District Court's action and the majority opinion was that "one of the most regulated of industries becomes *entirely free from regulation* at a time when the public need is greatest" (R. 69). His repetition of that statement three times in differing but emphatic language (R., pp. 70, 76) tends to suggest that he would not have dissented unless he had believed the statement to be correct. But there is utterly no foundation for it in the record or in the Massachusetts statutes; and Petitioners, though they are the regulatory authority in Massachusetts, have adduced nothing save assertion in support of it.

The record shows that approximately 86% of the persons in Old Colony territory who formerly used its trains before the March 1 discontinuance are still being served by the passenger service that is still being run on the Old Colony Division. A reading of Chapters 159 and 160 of the Massachusetts General Laws will show that D. P. U., despite the plan of reorganization, still has power to regulate the existing passenger service under about seventy separate sections of the Massachusetts law. These sections run the entire gamut between regulation of fares (Ch. 159, Sec. 14) and the placement and marking of drinking

[21] D. P. U. also makes the broader claim that the order "has freed the reorganized Railroad of *all* supervision by State regulatory power" (Brief, p. 37); but D. P. U. has not attempted to show how removal of State control over the amount of passenger service could possibly have ended regulatory power over freight service, other aspects of passenger service that is operated, or indeed the many other matters as to which railroad corporations and their operations are subjected to the exercise of regulatory power in Massachusetts.

cups in passenger cars (Ch. 160, Sec. 174). They include, among many others, safety appliances on passenger cars (Ch. 160, Sec. 176), the form and terms for the issuance of tickets (Secs. 187, *et seq.*), the furnishing of reasonable accommodation for the convenience and safety of passengers (Sec. 172) and the form and publication of rate schedules (Ch. 159, Sec. 19). Despite its statements to the contrary, therefore, it seems reasonable for this Court to assume that D. P. U. is now exercising the very regulatory authority over the passenger service that its brief in this Court denies. In truth the only authority that the plan denied it is the authority to say how much of the passenger service shall be run.

Conclusion.

Petitioners offer as their passport to this Court "an important question of Federal law" whether or not a District Court may change a railroad plan of reorganization after consummation (Petition, p. 6), but no such question is presented on this record. Both Courts below knew it was no part of their function to change the plan and neither Court made any change in it. Instead they dealt only with its meaning,—a question that Petitioners present to this Court only indirectly and through their assumption that somehow the plan's meaning was changed. Though Petitioners suggest a conflict of decision on the question of power to alter a plan (pp. 4, 5), there is in fact no such conflict or possibility of conflict on the well-settled rule, applied below, that only the Commission can make or alter a plan.

The filing of the petition poses merely a question as to why it was filed at all; for if it is successful, and if Petitioners' argument upon it is sustained, the ultimate result will be that the people the Attorney General claims to represent will find themselves without any passenger service on the former Old Colony lines. We submit that there is nothing in good sense, in the history of the plan provisions, in the content of those provisions, or indeed in Petitioners' arguments, that would compel us on March 1 to refrain from serving 86% of the people in Old Colony territory simply because the obligation to serve them has come to an end.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 661.

COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,
Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

PETITION FOR REVIEW.

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Respondent.*

PETITION FOR REVIEW.

Now come Thomas A. Flaherty, Edward N. Gadsby, John M. Whouley, David M. Brackman and James M. Carroll, as they are the Commission of the Department of Public Utilities, representing the Commonwealth of Massachusetts, and respectfully pray that this Honorable Court review the petition for writ of certiorari filed in the above-entitled matter by the said department, which petition was denied by the Court on April 24, 1950, and assign as reasons therefor the following:

I. The denial of petitioners' petition for writ of certiorari leaves in obscurity a grave and important question of law going to the heart of the plan which the Court of Appeals failed utterly to perceive so far as its majority decision indicates. That question involves the meaning of the Plan, which question was not included in the questions

specifically brought forward in the petition for writ of certiorari.

While the majority opinion of the Court of Appeals for the Second Circuit upholds the order of the District Court to the effect that the Plan did not require the Railroad to provide adequate passenger service on the Old Colony Division, that opinion did not specifically discuss the meaning of paragraph N (3) (a) of the Plan.

Paragraph N (3) (a) provides:

> "Passenger service on Old Colony's lines may be discontinued if during any of the periods described below passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect. The critical figure for the initial critical period which shall comprise the 2 years following the consummation date or January 1, 1946, whichever shall be the later, shall be $850,000 for any 12 consecutive calendar months falling wholly within said initial critical period. The critical figure for any 24 consecutive calendar months, all of which shall be subsequent to the initial critical period, shall be $500,000. In the event that passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect, and if as a result thereof the reorganized principal debtor or the Old Colony shall elect to discontinue passenger service on Old Colony's lines, the Commonwealth of Massachusetts shall have the option of purchasing that portion of the Boston group lines extending from Boston to Braintree at the salvage value thereof which has been accepted for the purposes of the plan (the proportion of $2,328,895, the salvage value of the entire Boston group lines estimated in 1939, applicable to the Braintree branch), plus the depreciated amount of capital improvements made since the date of the appraisal, said option, however, to be limited to such facilities

appurtenant to said Boston-Braintree segment as shall reasonably be required by the Commonwealth of Massachusetts for its passenger operation and subject to a right in the reorganized company or in the Old Colony, as the case may be, to make joint use of such of said facilities as are not reasonably required for the exclusive use of the Commonwealth of Massachusetts; provided, however, that such option shall be valid only for a period of 10 years after the consummation of the plan; and provided further that in the event the Commonwealth of Massachusetts shall exercise the option provided herein, the reorganized principal debtor and the Old Colony shall so far as possible accord to the Commonwealth the right to use the Boston Terminal Company property on the same terms and conditions as possessed by the reorganized principal debtor and the Old Colony. Full jurisdiction shall be reserved to the court to determine at the appropriate time, if future controversies should arise, what facilities are in fact reasonably needed for such passenger operation by the Commonwealth and the salvage value thereof as established by the method indicated in the sub-section of the plan, and to enter any and all appropriate orders in the premises."

The majority decision of the said Court of Appeals held that the word "may" gives the Railroad the right to determine how much passenger service shall be given after the so-called critical figures have been reached. Thereafter it may continue such passenger service on the Old Colony Division as it elects. Withal, however, it still reserves the right to discontinue passenger service on the Old Colony Division in its entirety whenever it may so elect. In justification of its position the Railroad stated in its brief: "We submit there is nothing in good sense, in the history

of the plan provisions, in the content of those provisions, or indeed in Petitioners' arguments, that would compel us on March first to refrain from serving 80% of the people in Old Colony territory simply because the obligation to serve them has come to an end."

The history of the Plan clearly shows that the Interstate Commerce Commission indicated that paragraph N (3) (a) contemplated complete abandonment of passenger service on the Old Colony Division. That view was held by the District Court and the New Haven until the present proceedings began.

Early in the reorganization a committee of experts was appointed by the court to appraise the Old Colony, and they all reported that Old Colony could not be operated as a passenger line without a serious drain on the resources of the New Haven.

In its first report the Interstate Commerce Commission felt that bringing the Old Colony into the New Haven Railroad would cast a great burden upon New Haven, and hence it then made no provision for the Old Colony. Subsequently it held that a further trial period, in which the efforts on the part of all concerned to improve the situation by reducing passenger losses, should be continued. First Supplemental Report, 244 I.C.C. 239, 264, 265. Later a joint report induced the Interstate Commerce Commission to include the acquisition of the Old Colony properties in the reorganized New Haven. The Commission, however, based that finding "upon the premise that the passenger losses of the Old Colony would be eliminated or largely reduced." Third Supplemental Report, 254 I.C.C. 63, 88. In the Fourth and Fifth Supplemental Reports the Interstate Commerce Commission rejected any proposals to modify that plan.

By Section N (2) (a) the Commission provided that the charters of the reorganized New Haven and of Old Colony

shall be amended so that neither road will be under any obligation to operate passenger service on Old Colony line. The reorganized company shall, however, undertake a contractual obligation to operate for its own account passenger service on Old Colony lines if and so long as the losses therefrom do not exceed the critical figures provided below.

Although section N (3) (a) states that passenger service on Old Colony may be discontinued, the definite statement in section N (2) (a) that passenger service shall be operated if and so long as the losses do not exceed the critical figures indicates that the Commission intended the permissive words in section N (3) (a) to be interpreted from the national or federal viewpoint; that is, that passenger service on Old Colony should be continued only so long as the losses therefrom do not put an undue burden on interstate commerce.

Yet, if the decision of the court below be permitted to stand, the reasoning of the Interstate Commerce Commission would be totally disregarded and the words in section N (3) (a) can only be held to mean that, even though the burden on interstate commerce continues, the reorganized Railroad is justified in continuing at will passenger service on the Old Colony Division regardless of its effect on interstate commerce. Thus there is presented an important and crucial question which ought to be determined by this Honorable Court. As the matter now stands, by denial of petitioners' writ of certiorari, and as the Railroad admits in its brief, the amendment of the state charters by paragraph N (2) (a) only penalizes or deprives a sovereign state of some of its inherent powers, whereas the Railroad may, so long as it desires, continue to operate without check or hindrance. Certainly no court would hold that deprivation by paramount power of state rights has only a unilateral effect.

II. Nowhere in the Railroad petition, in the decisions or reasoning thereon, has any mention of or consideration been given to the fundamental and basic question involved. That question is: What is the effect on interstate commerce? Is the reorganized Railroad aiding or burdening interstate commerce by continuing partial passenger service on its Old Colony Division? The record shows that the passenger loss for one year alone aggregated $3,848,-484.62. Is it reasonable to hold that, even with the economies purportedly created by the Railroad's action in partially discontinuing passenger service, a loss of at least two million dollars per year can be held not to burden interstate commerce? That question can only be answered by a decision of this Honorable Court as to the precise meaning of the specific clauses hereinbefore enumerated. Is it reasonable to assume that a court is warranted in stating that the Interstate Commerce Commission intended by those clauses to permit a regulated industry to be freed from all regulation? Further, would the court be warranted in dismissing th petition merely because a decision on the matter would inevitably work hardship on the intrastate commuting public?

Further, mere temporary relief under the charitable or benevolent will of a railroad offers no real solution of the problems facing the nation or the Commonwealth of Massachusetts, especially the commuting public. If the people must eventually face the problem of providing other means of transportation, a clear-cut decision of the real meaning of the salient clauses of the Consummated Reorganization Plan would be of great assistance in meeting such eventual crisis and would be particularly illuminating to the problems facing reorganization matters of the other railroads of the nation.

Thus there is presented in this petition a definite, important question which the Court should decide.

That question is whether a court may read into certain clauses of the Reorganization Plan a meaning entirely distinct from that intended to be given by the Interstate Commerce Commission.

The petitioners therefore respectfully appeal to the discretion of this Honorable Court and request that they be given an opportunity to be heard on the many points involved. A clear and concise opinion from this Honorable Court will do much to prevent the confusion that will result should the decision of the court below be permitted to stand.

Respectfully submitted,

COMMISSION OF THE DEPARTMENT
OF PUBLIC UTILITIES,

By FRANCIS E. KELLY, Attorney General,

By Francis J. Roche,
Assistant Attorney General,

David H. Stuart,
Assistant Attorney General.

Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 661.

COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

CERTIFICATE OF COUNSEL.

I, David H. Stuart, Assistant Attorney General, counsel for the petitioner in the above-entitled matter, do hereby certify that this petition for review by the Supreme Court of the United States is presented in good faith and not for delay.

DAVID H. STUART,
Assistant Attorney General.

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MAY 15 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 661.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

THE COMMISSION OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS,

Petitioners.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONSE TO "PETITION FOR REVIEW".

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THE COURT PRESS, N. Y. C.

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Respondent.

Response to "Petition for Review".

Both Courts below have told Petitioners in no uncertain language and with great particularity just what the plan of reorganization means with respect to the passenger service on Old Colony lines (R. 8-11—District Court; R. 65-68, and elsewhere—Court of Appeals). Indeed the plan's meaning was the only issue presented in the case; and it never would have arisen at all if Petitioners had not changed their minds at the last minute and issued a stop order

which would have prevented the carrying out of the plan in accordance with what both Courts below have found to be its plain meaning (Brief in Opposition, p. 13).

Having lost successively in the District Court and in the Court of Appeals, Petitioners then shifted their ground again and asked this Court to review and reverse the judgment below because they had concluded, after giving the matter further thought, that the plan had a different meaning from the one they had urged on the Courts below.[1] The petition was denied on April 24, 1950. Petitioners have now filed a so-called "Petition for Review", without any certificate that it is presented in good faith and without certifying that it is restricted to any particular ground [Rule 33(2)], in which they say that the plan's meaning is obscure and that they did not raise a specific issue as to its meaning in their petition.[2]

The shifting claims of the Commonwealth's present representatives with respect to the plan's meaning do suggest that its meaning has been obscure to them,—at least since February, 1949. But an obscurity so

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[1] The new claim was that the plan *required* the Railroad to take off all the service instead of permitting the Railroad either (a) to run all the service *or* (b) to take all of it off (Brief in Opposition, pp. 18-20).

[2] At most we think there was a technical non-compliance with this Court's Rule 38(2) in this respect (Brief in Opposition, p. 16), but Petitioners' latest view as to the meaning of the plan was implicit in several of the "Questions Presented" and that view was clearly asserted in their brief at pages 31-33. See Brief in Opposition, pages 16, 17. The Petition for Review adds nothing new except an altruistic suggestion, not based upon anything in the record, that the curtailed service is operated at a loss to us of at least $2,000,000 a year and that those who use it should be deprived of it in order to remove a burden on interstate commerce (p. 6).

limited and subjective cannot properly be said to give rise to a "grave and important question of law" (Petition for Review, p. 1) under this Court's rules relating to certiorari inasmuch as only the Commonwealth's representatives have had difficulty in interpreting the plan. We respectfully submit that no genuine question as to the plan's meaning exists anywhere except, possibly, in the minds of certain representatives of the Commonwealth.

Respectfully submitted,

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